89-5310

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO.,
d/b/a MOUNTAIN BELL,
a Colorado Corporation,

Petitioner,

v.

DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO, and
THE HONORABLE WILLIAM G. MEYER,
one of the judges thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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QUESTIONS PRESENTED

1. Can a class action defendant be forced, against its will and contrary to its First Amendment rights as articulated in such cases as *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), to disseminate notice of a class action in defendant's billing envelopes merely to reduce the plaintiffs' expense?

2. In answering the question left open in *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15 (1981), can the lower courts diminish the First Amendment protection of speech of class action litigants by characterizing the notice required by Rule 23 as "commercial speech," even though the notice does not propose a commercial transaction?

CERTIFICATE REQUIRED BY SUPREME COURT R. 28.1

1. ***Plaintiffs***:

Although the nature of this proceeding causes the district court and one of its judges to be the named respondents, the real parties in interest are the named plaintiffs in the lower court class action. They are:

Gordon C. Ham
Edward J. Dennis
Robert Kendall
Noel Harris
Sam Sulsky
All Western Sales and Leasing, Inc.

In addition to the named plaintiffs, the following is a description of the conditionally certified class of plaintiffs who are represented by the named plaintiffs:

> All persons and entities who have been telephone customers of Mountain Bell in Colorado any time since the Federal Communications Commission unbundled inside wire maintenance service in 1982 and who have been charged fees pursuant to Mountain Bell's optional inside wire maintenance service program at any time between the date that optional service took effect and August 25, 1988.

Plaintiffs contend that virtually every residential and small business customer of defendant Mountain Bell in the State of Colorado from 1982 to the present is a member of the class.

2. ***Defendant and Related Corporations***:

Defendant: Mountain States Telephone and Telegraph Co., d/b/a U S WEST Communi-

cations, formerly d/b/a Mountain Bell ("Mountain Bell").

The following are parent, subsidiary, or affiliated corporations of Mountain Bell:

U S WEST, INC. (parent of wholly-owned subsidiary, U S WEST Communications Group, Inc.)
U S WEST Communications Group, Inc. (parent of Mountain Bell)

3. ***Parties to Liability Sharing Agreement***:

In addition to the foregoing corporations that are related to Mountain Bell, the Court should be aware that U S WEST, Inc. is a party to a liability sharing agreement that it contends covers any judgment that may be entered against it in this litigation. This agreement was entered into as part of the Plan of Reorganization ordered in connection with the divestiture of the Bell Operating Companies from AT&T on January 1, 1984. Plaintiffs dispute the applicability of the provisions of the liability sharing agreement to this litigation.

The following is a list of the companies who are parties to the liability sharing agreement:

American Telephone and Telegraph Company
NYNEX Corporation
Bell Atlantic Corporation
BellSouth Corporation
American Information Technologies Corporation
Southwestern Bell Corporation
U S WEST, Inc.
Pacific Telesis Group

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DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO, and
THE HONORABLE WILLIAM G. MEYER,
one of the judges thereof,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

Petitioner Mountain States Telephone and Telegraph Co. ("Mountain Bell") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Colorado Supreme Court entered in this case on July 24, 1989.

SUMMARY OF ARGUMENT

In connection with a state court class action lawsuit involving virtually all of the company's customers in the State of Colorado, Mountain Bell has been ordered to include a plaintiffs' notice in its monthly billing envelopes. The proposed insert would state, *inter alia*, that Mountain Bell's customers may be entitled to

damages because of alleged "fraud practiced by [Mountain Bell]" as well as alleged "deceptive practices." Appendix D at 35a. Mountain Bell believes these charges to be absolutely false and does not wish to convey them to its own customers. While Mountain Bell's customers are entitled to receive the class notice under the Rules of Civil Procedure, forcing Mountain Bell to mail a notice containing allegations to which it takes vigorous exception violates the company's First Amendment rights.

Plaintiffs' only justification for intruding on Mountain Bell's right to refrain from disseminating a message it believes false is that it is cheaper for them to send the notice in Mountain Bell's billing envelopes than in their own. According to plaintiffs, it will cost them $300,000 to send the notice through their forced access to Mountain Bell's property instead of $500,000 if they had to send the notice in their own envelopes.

The constitutional violation addressed in Mountain Bell's Petition is likely to recur as other class representatives attempt to shift the cost of prosecuting their actions onto defendants, thereby abridging defendants' First Amendment rights. This case thus raises important issues of first impression involving the fundamental constitutional rights of Mountain Bell and other companies defending class action lawsuits. The decision below forcing Mountain Bell to grant its litigation adversaries access to its channels of customer communication impacts any corporate defendant, regulated or not, that regularly communicates with its customers through the mail.

Ignoring the clear alternative to burdening Mountain Bell's First Amendment rights, the Colorado Supreme Court accepted plaintiffs' economic concerns

and relied upon this Court's opinion in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978) (approving proposition that it is within the trial court's discretion to require a class action defendant to perform some tasks). *Oppenheimer*, however, did not address the First Amendment implications of forcing a litigant to disseminate the notice of its opponents. Indeed, the case was decided two years before one of this Court's landmark corporate speech cases, *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), and eight years before this Court explicitly held that a corporation could not be forced to offer its billing envelopes to others for the purpose of disseminating a message with which the corporation disagreed. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986) (hereinafter "*PG&E*").

To discount the wealth of post-*Oppenheimer* law, the Colorado Supreme Court, without discussion, improperly characterized the compelled access here as a regulation of "commercial speech," thereby evading rigorous constitutional review of the order. The court thus took the wrong path blazed by the Eleventh Circuit in *Kleiner v. First National Bank*, 751 F.2d 1193 (11th Cir. 1985). In so doing, the Colorado Supreme Court summarily disregarded another forced-access case in which the Seventh Circuit Court of Appeals expressly refused to rely on such an erroneous mischaracterization. *Central Illinois Light Co. v. Citizens Utility Bd.*, 827 F.2d 1169 (7th Cir. 1987). In addition, the Colorado Supreme Court's decision conflicts with the *Central Illinois* case by wrongly characterizing the class action notice as the sort of "legal notice" referred to as permissible in footnote

12 of *PG&E* and by equating an "objectively neutral" notice with the "content neutral" regulation of speech.

The lower courts similarly are confused about the extent to which trial courts may regulate the speech of litigants involved in class actions. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), this Court reviewed a decision by the Fifth Circuit holding that a trial court's order impairing class action litigants' free speech rights violated the First Amendment. This Court, however, declined to define the scope of litigants' First Amendment speech rights in a class action setting, choosing instead to hold that the error in *Bernard* involved an abuse of Fed. R. Civ. P. 23. *Bernard*, 452 U.S. at n.15. This Court's restraint has led to differing results among the lower courts and has permitted the Colorado Supreme Court uncontrolled discretion to approve with relative ease a serious intrusion on Mountain Bell's First Amendment rights. This Court should grant this Petition to remove the uncertainty concerning the extent of litigants' First Amendment rights and eliminate the lower courts' practice of characterizing the impairment of First Amendment rights in the litigation context as the regulation of "commercial speech."

OPINIONS BELOW

The opinion of the Colorado Supreme Court is not yet reported but is reprinted in Appendix A, 1a - 23a. The trial court's oral ruling was issued from the bench and is unreported. The portion of the transcript memorializing the trial court's forced-access order is reprinted at Appendix C, 26a - 33a.

JURISDICTION

The judgment for which review is sought was entered by the Colorado Supreme Court on July 24, 1989, and is found at Appendix A, 1a - 23a. It involves no disputed factual issues and raises only pure questions of law. The court upheld, over Mountain Bell's First Amendment challenge, a Colorado state trial court order requiring Mountain Bell to include in its monthly billing envelopes the class action notice of a group of plaintiffs in a lawsuit against Mountain Bell.[1]

Specifically, the judgment for which review is sought was entered in an Original Proceeding brought by Mountain Bell in the Colorado Supreme Court challenging the trial court's forced-access order on First Amendment grounds.[2] Under Colo. Const. art. VI,

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[1] On August 11, 1989, the Colorado Supreme Court granted Mountain Bell a stay of the issuance of the mandate until September 11, 1989. Appendix B, 24a - 25a. The stay has expired. On September 1, Mountain Bell filed an "Application to Continue Stay of Mandate of Supreme Court of Colorado Pending Disposition of Petition for Writ of Certiorari," which was denied by Justice White on September 6, 1989. The Colorado Supreme Court issued its mandate on September 21, 1989. Plaintiffs have indicated that they intend to compel prompt insertion of the notice in Mountain Bell's bills. Mountain Bell, however, has filed this Petition well ahead of the deadline in which to file (October 23, 1989) with the belief that this Court will rule on this Petition before the mailing of plaintiffs' notice. If this Petition is granted, Mountain Bell immediately will renew its request for stay in order to preserve its rights and the jurisdiction of this Court.

[2] An original proceeding in the Colorado Supreme Court involves naming as respondents the trial court and judge who issued the questioned order. A petition for an order to show cause is filed with the Supreme Court and, after its initial re-

§ 3, and Colo. App. R. 21, the Colorado Supreme Court has original jurisdiction to consider matters not yet reviewable on appeal. The test for determining reviewability under these provisions is similar in part to the test used in the federal courts for reviewing appealable "collateral orders" under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Under *Cohen*, otherwise interlocutory orders which conclusively decide important collateral issues can be appealed prior to the entry of a final judgment in those situations where appellate review would be meaningless if the parties had to wait until a final judgment was entered to obtain it. Similarly, the Colorado Supreme Court will review otherwise unappealable orders if the remedy obtainable by a successful appeal after final judgment is inadequate. *People v. District Court*, 664 P.2d 247 (Colo. 1983). By granting review of Mountain Bell's claims, the Colorado Supreme Court recognized that Mountain Bell's right to appellate review of the trial court's mailing order would be meaningless if it had to wait until after the notice was sent to seek review.

The Colorado Supreme Court's ruling is, therefore, a final judgment within the meaning of 28 U.S.C. § 1257, and this Court has jurisdiction to review Mountain Bell's Petition. *National Socialist Party of*

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view, an order to show cause may be issued to the respondent court. Normally, as here, counsel for the opposing party files the responsive brief on behalf of the respondent court. If, after briefing and consideration (but without oral argument), the Colorado Supreme Court agrees with the petitioner, the rule to show cause is made absolute. If the court rejects the petitioner's position, the rule to show cause is discharged. ReMine, *Original Proceedings in the Colo. Sup. Ct.*, 1983 Colo. Lwr. 413, 418-19; CLE in Colo., *Colorado Appellate Handbook*, § 17 (1984).

Am. v. Village of Skokie, 432 U.S. 43, 44 (1977) (relying on *Cohen* in holding that a state court ruling finally adjudicating petitioners' First Amendment claims is a reviewable final judgment); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481-82 & n.10 (1975) (describing class of interlocutory but "final judgments" from state courts where federal claim has been finally decided and where review of federal issue by Supreme Court will be granted; also citing *Cohen*).

This Court's case law recognizing the validity of *Cohen* review in certain class action situations underscores the appropriateness of reviewing this case under *Skokie* and *Cox*. *E.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (order requiring defendant to pay 90% of the costs of class action notice is an appealable collateral order); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 347 n.8 (1978) (order allocating expense of class identification is an appealable collateral order). A Third Circuit opinion addressing the appealability of an order burdening First Amendment rights in a class action context, while also a *Cohen* case, particularly underscores the appropriateness of review here. *In re School Asbestos Litigation*, 842 F.2d 671 (3d Cir. 1988) (order regulating distribution by defendant of informational booklets to class members in the face of a First Amendment challenge is collateral and reviewable).

Mountain Bell's First Amendment argument was fully and properly raised in the trial court, was reviewed by the Colorado Supreme Court, and a final judgment was issued that finally adjudicated Mountain Bell's First Amendment claims in Colorado's courts. No further action is available to review or revise that order. Just as in collateral order cases arising out of

the federal courts, the issue of whether Mountain Bell must mail plaintiffs' class notice in its billing envelopes is completely collateral to and distinct from the merits of plaintiffs' claims and Mountain Bell's defenses and counterclaims. The Colorado Supreme Court's order will be unreviewable hereafter since, once Mountain Bell has to mail the notice, its First Amendment rights will have been completely and irretrievably abrogated. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

APPLICABLE PROVISIONS OF THE UNITED STATES CONSTITUTION, COLORADO LAW, AND FEDERAL PROCEDURAL RULES

The applicable provisions of the United States Constitution, Colorado law, and Federal Rules of Civil Procedure are reproduced in Appendix E, 40a - 45a.

STATEMENT OF THE CASE

This case arises out of a class action lawsuit filed in a Colorado trial court against Mountain Bell. Plaintiffs, five individual customers and a corporate customer, alleged that Mountain Bell's sale of inside wire maintenance service violates various state consumer protection and antitrust laws.[3] Mountain Bell denied these allegations and asserted various setoffs and counterclaims. Over Mountain Bell's objections, the state trial court certified the case as a class action consisting of substantially all Mountain Bell customers in Colorado from 1982 to August 25, 1988.

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[3] Inside wire maintenance involves repairs to telephone wiring and telephone jacks in the customer's home or place of business.

The trial court then heard argument on the question of how to provide notice to the class members. Plaintiffs, of course, could have mailed the notice. Instead, they asserted that their costs to send notice to the class by first class mail would be in excess of $500,000, but if Mountain Bell were ordered to include the notice in its billing envelopes, plaintiffs could save approximately $200,000. 4a - 5a.[4] Mountain Bell opposed plaintiffs' proposal to send their notice in its billing envelopes, arguing that such a plan violated the company's First Amendment rights. Over Mountain Bell's objection, the trial court ordered Mountain Bell to give plaintiffs access to its billing envelopes to deliver their notice to Mountain Bell's Colorado customers.[5]

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[4] Portions of the proposed notice are quoted in the Colorado Supreme Court opinion at 7a - 9a, n.3. The entire text of the proposed notice is reproduced in Appendix D, 34a - 39a.

[5] In a parallel federal proceeding, the United States District Court for the District of New Mexico issued a virtually identical forced-access order. *Sollenbarger v. Mountain States Telephone & Telegraph Co.*, 121 F.R.D. 417 (D.N.M. 1988). That case involves the same inside wire maintenance service offered by Mountain Bell, but the certified class consists of customers in all seven states served by the company. Different named plaintiffs filed the *Sollenbarger* action, but they are represented by two of the same counsel who represent plaintiffs in this action, Robert J. Dyer, III, and George Gary Duncan. Mountain Bell has appealed the forced-access order in *Sollenbarger* as well, and that appeal presently is before the United States Court of Appeals for the Tenth Circuit, No. 88-2756. The case has been briefed, but oral argument has not been scheduled. The pendency of the appeal in the Tenth Circuit in no way affects the finality of the Colorado Supreme Court's judgment. If relief is not obtained in this Court, Mountain Bell will be forced to mail plaintiffs' class notice to its Colorado customers irrespective of any action taken by the Tenth Circuit.

In the Colorado Supreme Court, Mountain Bell argued that forcing the company to give plaintiffs access to its billing envelopes violated Mountain Bell's First Amendment rights. Mountain Bell relied on *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986) ("*PG&E*"), other United States Supreme Court precedents, and a recent decision of the United States Court of Appeals for the Seventh Circuit, *Central Illinois Light Co. v. Citizens Utility Bd.*, 827 F.2d 1169 (7th Cir. 1987) (hereinafter "*Central Illinois*"), all clearly holding that a private corporation cannot be compelled to disseminate the views of others with which it disagrees. Mountain Bell argued that even if the trial court could force access in some circumstances, the lower court's order in this case was not narrowly tailored to serve a substantial state interest. Mountain Bell also argued that Colo. R. Civ. P. 23 did not provide the trial court with authority to override Mountain Bell's First Amendment rights.

The Colorado Supreme Court rejected Mountain Bell's First Amendment challenge. The court first held that "there are cases in which it is appropriate to relieve the plaintiff of the burden . . . and to require the defendant to perform the task of sending the class notices to class members." 14a - 15a (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978) which, in a footnote, observed that some trial courts had required defendants to mail the class action notice).[6]

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[6] In fact, the courts in those cases did not order defendants to enclose class notices in their mailings to class members. Rather, the courts in all three cited cases merely noted that

The court then considered whether the First Amendment prevented the trial court from compelling Mountain Bell to provide access to the plaintiffs in this case. In answering this question, the court held, remarkably but without explanation, that Mountain Bell's First Amendment rights, as recognized in such cases as *PG&E* and *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), were less extensive because the compelled access at issue in this case merely related to "commercial speech." 16a - 17a (citing, *inter alia*, *Board of Trustees of State Univ.*

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such a procedure represented one option for the parties and the court to explore. *See Ste. Marie v. Eastern R.R. Ass'n*, 72 F.R.D. 443, 450 n.2 (S.D.N.Y. 1976) (holding class action treatment proper under 23(b)(2); footnote suggests even if case certified under (b)(3), notice could be accomplished either through direct mail or through inclusion in pay envelopes); *Gates v. Dalton*, 67 F.R.D. 621, 633 (E.D.N.Y. 1975) ("plaintiff should be allowed to explore the possibility of using" already established lines of communication); *Popkin v. Wheelabrator-Frye, Inc.*, 20 Fed. R. Serv. 2d 125, 130 (S.D.N.Y. 1975) ("[p]ossible alternative methods for reducing the cost of notice may include the use of defendant's mailing facilities").

Moreover, several courts have rejected class representatives' proposals to use defendants' billing envelopes for disseminating class notices recognizing, even outside the First Amendment context, the detrimental impact of such a procedure on customer relations. *Dennis v. Saks & Co.*, 1975-2 Trade Cas. ¶ 60,396 (S.D.N.Y. 1975). *See also Cosgrove v. First & Merchants Nat'l Bank*, 68 F.R.D. 555, 561 (E.D. Va. 1975) (noticing class members by inserting copies of the notice in the defendant bank's account statements inappropriate because some current customers are not members of the class); *Martinez v. Bechtel Corp.*, 21 Fed. R. Serv. 2d 85, 93 (N.D. Cal. 1975) (defendant not required to use its mail to notify class members because, under *Eisen*, plaintiffs rather than defendant must bear the cost and inconvenience of performing this task).

of New York v. Fox, 109 S. Ct. 3028 (1989)). Relying upon the greater discretion afforded the state in regulating commercial speech, and upon Rule 23(c)(2)'s notice requirement, the court then held that the compelled access was "reasonably related to the substantial governmental interest of providing a fair and cost-effective method for resolving a multitude of claims involving common issues of fact or law in one lawsuit." 17a.

In the Colorado court's view, *PG&E* was inapposite. The court distinguished *PG&E* on the basis that, in *PG&E*, the regulation mandating inclusion of an adversary's message in the utility's billing envelopes was not content neutral. In this case, the court asserted, plaintiffs' notice was "objectively neutral," which the court incorrectly equated with "content neutral" regulation of speech, and asserted that the plaintiffs' notice was really that of the trial court. Accordingly, the court concluded that plaintiffs' notice effectively was a "legal notice," as described in Justice Powell's plurality opinion in *PG&E* (*id.*, 475 U.S. at 15 n.12) and in Justice Marshall's concurrence in that case (*id.*, 475 U.S. at 23 n.2). 20a - 21a. For the same reasons, the court summarily dismissed the Seventh Circuit's reasoning in the *Central Illinois* case. 21a n.6.

WHY THIS COURT SHOULD GRANT CERTIORARI

This Court should grant Mountain Bell's Petition in order to resolve the conflict between the Colorado Supreme Court's decision below and the Seventh Circuit's decision in the *Central Illinois* case and eliminate confusion among the lower courts with respect to the relationship between rights under Fed. R. Civ. P. 23 and litigants' rights under the First Amend-

ment. This Court has not spoken definitively on two constitutional questions central to the Colorado Supreme Court's erroneous decision: (1) the difference between "commercial speech" and speech that merely involves a commercial actor in a litigation context; and (2) the extent to which courts in class action lawsuits can compel defendants to assist plaintiffs under Rule 23,[7] when to do so impairs the defendants' First Amendment rights and unconstitutionally intrudes upon communications with their customers—all simply to save plaintiffs some expense. As a result, lower courts, including the Colorado Supreme Court, have little guidance in applying fundamental First Amendment guarantees in the important class action setting.

I. THE COLORADO SUPREME COURT ERRED IN APPLYING THE LAW OF THIS COURT, AND ITS DECISION SQUARELY CONFLICTS ON SEVERAL CONSTITUTIONALLY SIGNIFICANT POINTS WITH A DECISION FROM THE SEVENTH CIRCUIT.

The Colorado Supreme Court erred in several constitutionally significant ways. It mischaracterized the class notice as "commercial speech" and used an improperly relaxed test to evaluate the order's constitutionality; it elevated *Oppenheimer*'s footnote above the First Amendment holding of *PG&E*; it erroneously attempted to squeeze this case into the first

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[7] While the Colorado Supreme Court applied Colo. R. Civ. P. 23, Colorado's rule is virtually identical to Fed. R. Civ. P. 23, and the Colorado Supreme Court relied exclusively on this Court's Fed. R. Civ. P. 23 cases in upholding the trial court's order. 10a. In deciding this case, this Court will clarify the extent to which First Amendment rights can be impaired by Fed. R. Civ. P. 23.

half of a *PG&E* footnote (475 U.S. 15 n.12) while ignoring the remainder of the footnote; it incorrectly equated speech which is "neutral in tone" with "content neutral" regulation of speech; and it attempted to turn a purely private interest, plaintiffs' desire to save money, into a "substantial governmental interest," negating Mountain Bell's First Amendment rights and, indeed, effectively awarding plaintiffs some property rights to the company's billing envelopes. The court's misinterpretation of *PG&E* also is in direct conflict with the Seventh Circuit's decision in *Central Illinois*.

A. The Colorado Supreme Court Erred By Characterizing The Class Action Notice As "Commercial Speech."

In an apparent effort to avoid the clear impact of *PG&E*, the Colorado Supreme Court misinterpreted the scope of commercial speech and dangerously broadened that definition, as articulated most recently in *Board of Trustees of State Univ. of New York v. Fox*, 109 S. Ct. 3028 (1989), beyond any holdings of this Court. Given the limited First Amendment protection afforded commercial speech, it is critically important that "the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 579 (1980) (Stevens, J., joined by Brennan, J., concurring). For this reason, this Court should grant Mountain Bell's Petition.

The Colorado Supreme Court's fundamentally flawed analysis derives from its remarkable conclusion that the class notice is "commercial speech." 16a - 17a. As this Court made clear in *Fox*, the test for

determining whether speech is commercial is whether it "'propose[s] a commercial transaction.'" *Id.* at 3031 (citations omitted). Although the Colorado Supreme Court cited *Fox*, curiously, it failed to mention *Fox*'s definition of commercial speech. The class notice in this case proposes participation in a lawsuit, not a commercial transaction. Moreover, plaintiffs, not Mountain Bell, are making the proposal. If the notice in the case at bar could be viewed as an invitation to enter into a commercial transaction at all, it is the plaintiffs' invitation that is at issue. It can hardly be argued that *Mountain Bell's* First Amendment rights are reduced because *plaintiffs* wish to engage in commercial speech! None of the reasons that justify according commercial speech reduced First Amendment protection relate in any way to the speech at issue here. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

In the absence of guidance from this Court, at least one federal court of appeals has made the same mistake as the Colorado Supreme Court. *Kleiner v. First National Bank*, 751 F.2d 1193, 1203-07 & n.22 (11th Cir. 1985) (hereinafter "*Kleiner*"). In *Kleiner*, the Eleventh Circuit, like the Colorado Supreme Court, branded speech which had nothing to do with proposing a commercial transaction as "commercial speech" in order to facilitate judicial approval of speech regulation under a more relaxed standard. In *Kleiner*, the district court sanctioned defendant's counsel for authorizing employees of the defendant to contact members of the purported class. Defendant's counsel argued that the defendant had a First Amendment right to speak as it did. The Eleventh Circuit,

perhaps unsure that the sanctions could be sustained under traditional First Amendment analysis, instead characterized the defendant's speech as "commercial speech." The speech related to the class action lawsuit and had nothing to do with any proposed commercial transaction. Nevertheless, the Eleventh Circuit characterized the speech as "commercial speech," noting that its purpose was "to defend its business dealings; its motivation, to shore up Bank earnings." *Id.* at 1203 n.22. Under this approach, virtually all corporate speech is commercial speech because virtually all corporate speech at least arguably advances a corporation's financial interests.

The Colorado Supreme Court's opinion and the Eleventh Circuit's opinion in *Kleiner* directly conflict with the Seventh Circuit's decision in *Central Illinois*. In that case, the Seventh Circuit reviewed an Illinois state law requiring utilities to include in their billing envelopes notices on behalf of a consumer board opposing the utilities in Illinois regulatory proceedings. The consumer board argued that the forced-access statute was constitutional by relying on one of this Court's major commercial speech cases, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Using the same commercial speech analysis eventually employed by the Colorado Supreme Court and by the Eleventh Circuit in *Kleiner*, 751 F.2d at 1204-05, the consumer board in *Central Illinois* attempted to show that forced access was "reasonably related to a legitimate state interest," namely, insuring that consumers had a fair voice in proceedings before the state utility commission. 827 F.2d at 1173. Unlike the Colorado Supreme Court and the Eleventh Circuit in *Kleiner*, however, the Seventh Circuit properly re-

jected application of this Court's commercial speech cases; instead, the court relied upon the second half of *PG&E* footnote 12 (a part which the Colorado Supreme Court chose to ignore), quoted below at page 18. According to the Seventh Circuit:

> While *Zauderer* holds that sellers can be forced to declare *information about themselves* needed to avoid deception, it does not suggest that companies can be made into *involuntary solicitors for their ideological opponents*.

Id., 827 F.2d at 1173 (emphasis added).

Unlike the Seventh Circuit, the Colorado Supreme Court and the Eleventh Circuit in *Kleiner* arrived at the wrong conclusion by equating "speech dealing with commercial transactions" with "commercial speech." 16a - 17a; 751 F.2d at 1203 n.22. It would destroy much of this Court's First Amendment jurisprudence, as the Court has recognized explicitly, to hold that because a communication is by a commercial actor or is "about" commercial transactions it becomes, *ipso facto*, "commercial speech." *Virginia Pharmacy*, 425 U.S. at 761-62. Without guidance from this Court, lower courts will continue to be confused over the proper application of the commercial speech doctrine.

B. The Colorado Supreme Court Erred In Characterizing The Class Action Notice As A "Legal Notice."

In its attempt to distinguish *PG&E*, the Colorado Supreme Court relied upon portions of the footnoted comments in Justice Powell's plurality opinion (*id.*, 475 U.S. at 15 n.12) and Justice Marshall's concurrence (*id.*, 475 U.S. at 23 n.2) in *PG&E*. These state-

ments stand for the proposition that state utility commissions can compel utilities to provide access for commission-generated messages directly related to the provision and regulation of utility service. However, the Colorado court simply omitted and failed even to acknowledge the last portion of Justice Powell's footnote 12 qualifying this proposition. The footnote states:

> The Commission's Order is thus readily distinguishable from orders requiring appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated. The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See, *Zauderer v. Office of Disciplinary Council*, 471 U.S. [626, 651] (1985). *Nothing in* Zauderer *suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.*

Id., 475 U.S. at 15 n.12. (Italicized text not discussed by Colorado Supreme Court. *See* 20a.)

The Colorado court erred by ignoring the distinction between allowable regulatory legal notices (discussed in the first portion of footnote 12) and adverse third party notices expressly barred from mailing envelopes as unconstitutional (addressed in the last sentence of footnote 12). The legal notices identified in the opinions of Justices Powell and Marshall involved either information from a state utility commission itself or

information which state statutes or the utility commission ordered the company to disclose as an essential part of the regulation of utility services. Indeed, the record in *PG&E* underscores this fact.[8]

There is a fundamental reason for the distinction between, on the one hand, requiring access when such access necessarily is related to the business of providing a regulated service and, on the other hand, recognizing utility company rights when the interests of non-governmental adversaries in litigation are involved. When a utility chooses to serve the public through acceptance and operation of a state-author-

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[8] In its brief to this Court, the California Public Utility Commission described the kinds of notices that it previously had ordered utility companies to include in their bills:

> Recent bill inserts ordered by the Commission have notified telephone subscribers of a lifeline program to ensure universal service in the wake of AT&T divestiture, have indicated that elderly and handicapped customers may designate third parties to receive notices on their behalf to forestall the improper discontinuance of service, have announced the availability of communications devices for the deaf, have detailed in foreign languages emergency telephone numbers and dialing information, have announced the availability of water conservation devices, have provided information concerning a wide variety of Commission-approved weatherization and energy conservation programs, have explained the effects of certain legislation on utility rates and have explained the components of utility costs, services and rate increases.

Brief for Appellee at 16 n.19, *PG&E* (U.S. Sup. Ct. No. 84-1044). *See also id.* at 12-16. The examples provided by the PUC stand in stark contrast to the situation presented in this case. Here, an adversary in litigation is seeking access to Mountain Bell's billing envelopes.

ized monopoly, the utility voluntarily accepts concomitant state regulation directly related to engaging in its monopoly, knowing that such regulation can include regulation of the use of its property.

Nevertheless, utility property is private property, *United Rys. & Elec. Co. v. West*, 280 U.S. 234, 249 (1930), and neither Mountain Bell nor any other utility can be compelled constitutionally to lend its property to some group of private individuals who wish to use it to convey views with which the company vigorously disagrees and which the company believes will prejudice its relationship with its customers. *See PG&E*, 475 U.S. at 17 (Powell, J.; PUC's assertion that it owns the extra space in the envelopes "misperceives . . . the relevant property rights"); *id.* at 21 (Burger, C.J., concurring; noting private character of property "used in the conduct of its business"); *id.* at 22 n.1 (Marshall, J., concurring; "[h]aving chosen to keep utilities in private hands, however, the State may not arbitrarily appropriate property for the use of third parties by stating that the public has 'paid' for the property by paying utility bills"). The Colorado Supreme Court's decision is directly at odds with this Court's ruling in *PG&E*. Moreover, this part of the Colorado Supreme Court's opinion conflicts with the Seventh Circuit's decision in *Central Illinois*. *See* 827 F.2d at 1174 (citing concurrence by Marshall, J., and noting that "utilities here maintain the right to exclude others from their property").

In an apparent effort to fit within the "legal notice" exception of *PG&E* footnote 12 and to avoid the unquoted last sentence of that footnote, the Colorado court incorrectly characterized the class notice as the "court's" notice and the "court's" speech. 18a,

21a. Although the court, under Rule 23(c)(2), acts as an umpire in providing the class notice—that is, assures that it provides complete disclosure and is "objectively neutral"—the plaintiffs act as the pitcher. The plaintiffs, not the court, filed and are prosecuting this action. The plaintiffs, not the court, dictated the causes of action and the allegations in the pleadings which the notice will parrot. The notice is sent only because plaintiffs have chosen to frame a case that requires it. In contrast, notices related to the regulation of utility service are essential to the effective regulation of the provision of utility service. The utilities providing this service have accepted such regulation as a condition for engaging in their regulated monopoly business.

Here, it is the private party plaintiffs, not the trial court or state utilities commission, who seek access to Mountain Bell's billing envelopes, and it is the plaintiffs who are attempting to vindicate their own objectives and who hope to benefit by bringing this suit as a class action. As this Court has recognized, class notices advance the interest of and are for the benefit of plaintiffs. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178-79 (1974) ("Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit."). The notice at issue in this case is not at all analogous to commission-generated legal notices and, instead, falls directly within the last sentence of footnote 12: it is a third party's message which is expressly contrary to Mountain Bell's views and interests. For these reasons, consideration of this case by this Court is essential.

C. The Colorado Supreme Court Erred By Equating An "Objectively Neutral" Class Notice With "Content Neutral" Regulation Of Speech.

The Colorado Supreme Court and Seventh Circuit decisions also conflict on the question whether states can force companies to include the hostile messages of third parties so long as the information to be included is "objectively neutral." 18a. While the Colorado Supreme Court held that they can, *id.*, the Seventh Circuit correctly held that they cannot. In *Central Illinois*, the consumer board argued that while some of its past mailings may not have been objective, the state statute forcing access still should withstand a facial constitutional challenge because the statute, on its face, required the dissemination of only "objective, informational speech." 827 F.2d at 1172.[9] The Seventh Circuit squarely rejected this position. According to the court:

> the purpose, nature and activities of [the consumer board] *necessarily* produce speech that disagrees with [the utilities'] views.

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[9] Ill. Rev. Stat. ch. 111 2/3 § 909(1)(c) (1985), as quoted by the Seventh Circuit, 827 F.2d at 1171 (emphasis added), provides:

> An enclosure furnished by [the consumer board]. . . *shall be limited to* informing the reader of the purpose, nature and activities of [the consumer board] as set forth in this Act and informing the reader that the utility consumer billed may become a member in [the consumer board], maintain membership in [the consumer board] and contribute money to [the consumer board] directly. The enclosure may not have the character of a bill, statement or account. Information may include a membership application form.

Id. at 1173 (emphasis added). The Illinois statute struck down by the Seventh Circuit, on its face requires utilities to do no more than transmit a notice that announces the consumer board's existence and solicits financial support for it. It is strikingly similar, for constitutional purposes, to the notice at issue here. Although the plaintiffs' notice arguably is neutral in tone and notifies Mountain Bell's customers about the lawsuit, it "necessarily produce[s] speech that disagrees with [Mountain Bell's] views." *Id.* The notice contains allegations that are not at all neutral—charges that Mountain Bell defrauded its customers and violated state antitrust and consumer protection statutes. The Colorado Supreme Court's cursory treatment of *Central Illinois*, 21a n.6, clearly requires this Court's review.

Furthermore, the information for which forced access is sought in this case, while "unbiased" in the sense that it does not state definitively that Mountain Bell committed illegal acts, nevertheless requires the company to report the plaintiffs' unproven and emphatically denied allegations of wrongdoing. Conveying such antagonistic views through its customer communications undeniably is against the company's interest. Inclusion of this message in Mountain Bell's billing envelopes will cause greater damage to the company's relationships with its customers than if the message were sent in plaintiffs' envelopes. Since Mountain Bell, and not plaintiffs, would deliver the notice to customers, absent class members may perceive that Mountain Bell mailed the notice under compulsion, and they may conclude that the trial court forced Mountain Bell to provide such notice because Mountain Bell engaged in wrongdoing. Customers also

may assume Mountain Bell concedes plaintiffs' claims. In short, the presence of the class notice in Mountain Bell's billing envelopes increases the likelihood that the class will view the notice as validating plaintiffs' unproven claims, thus damaging customer goodwill.

Mountain Bell obviously cannot conceal from its customers the existence of plaintiffs' lawsuit, and due process requires that absent class members receive notice of this pending litigation. Nonetheless, the First Amendment prevents plaintiffs from using one of Mountain Bell's primary methods of communicating with its customers to provide this notice simply to save plaintiffs some expense. *PG&E*; *Riley v. National Federation of the Blind*, 108 S. Ct. 2667, 2676 (1988).

D. The Colorado Supreme Court's Justification For Restricting Mountain Bell's First Amendment Rights Is Not Substantial And Ignores Readily Available Alternatives.

Assuming, *arguendo*, that the class notice could be tortured into being commercial speech of Mountain Bell, and thereby only subject to the requirement that its regulation be reasonably related to a substantial governmental interest (*Fox*, 109 S.Ct. at 3032; 16a - 17a), the desire to save money for one adversary in private litigation is not a "substantial governmental interest." Nothing in the record suggests that plaintiffs will not be able to send out the notice in their own envelopes.

Nonetheless, in an effort to articulate a substantial governmental interest which could justify the trial court's order, the Colorado Supreme Court spoke of the state's interest in "eliminating the adverse consequences of repetitious litigation." 16a. *Cf. Central*

Illinois, 827 F.2d at 1173. Even if there is a substantial governmental interest in providing for class actions and class notification, it does not follow that there also is a substantial governmental interest in requiring defendants, rather than plaintiffs, to do the notifying.

As this Court has made abundantly clear, class action plaintiffs cannot shift the burden and expense of notification to defendants simply because the plaintiffs may not want to or be able to meet that expense. *Eisen*, 417 U.S. at 176 ("[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs"). This is even more true when First Amendment rights would be trampled. *Riley v. National Federation of the Blind*, 108 S. Ct. 2667, 2676 (1988) ("[w]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency").

Only plaintiffs' financial interest will be aided by the court's ruling. Protecting this interest does not justify putting the state's thumb on the plaintiffs' side of the scales of justice. Thus, whether analyzed appropriately as a content-based, non-commercial speech regulation, or even as commercial speech, there simply is no compelling or even substantial governmental interest to be served by the trial court's forced-access order.

Moreover, the forced-access order is not narrowly tailored to serve the interest, substantial or not, articulated by the Colorado Supreme Court. As this Court has long recognized, the government's regulation of speech must be narrowly tailored to serve the state's interest. *Fox*, 109 S.Ct. at 3035. If other

means are available to achieve the governmental interest without infringing First Amendment rights, the state must choose the non-infringing method. *PG&E*, 475 U.S. at 19 ("the State can serve that interest through means that would not violate appellant's First Amendment rights").

The Colorado Supreme Court completely ignored this requirement and instead approved the only method of class notification which violates Mountain Bell's First Amendment rights. A clear alternative means of notification exists: plaintiffs can send their notice in their own envelopes, with their own return address, to all the same customers, whose names and addresses would be supplied by Mountain Bell. The state's interest in having individual notice sent to class members thus could be satisfied fully without burdening Mountain Bell's First Amendment rights. The Colorado Supreme Court's failure to recognize this readily available alternative constitutes serious error requiring reversal by this Court.

II. THIS COURT SHOULD ELIMINATE THE CONFUSION AMONG THE LOWER COURTS WITH RESPECT TO THE EXTENT TO WHICH A TRIAL COURT CAN REGULATE CLASS ACTIONS UNDER RULE 23 WITHOUT VIOLATING LITIGANTS' FIRST AMENDMENT RIGHTS.

This case raises another important and unsettled issue of First Amendment law: the extent to which trial courts, under Rule 23, can burden litigants' First Amendment rights in a class action proceeding. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), this Court reviewed a judgment from an *en banc* Fifth Circuit holding that a trial court order restricting lawyer-class communications based upon Fed. R. Civ.

P. 23 violated the First Amendment. According to the Fifth Circuit:

> [T]he court's discretion under Rule 23 is a facet of its general authority to regulate the conduct of litigation. To the extent that Rule 23 implements the class action as a unique litigation device, that discretion may be correspondingly broadened, and we recognize broad management powers of the court under Rule 23. But, while a legislative enactment may alter the court's authority under common law, it may not encroach upon constitutionally protected rights.

Bernard v. Gulf Oil Co., 619 F.2d 459, 475 (5th Cir.), *cert. granted*, 449 U.S. 1033 (1980).

The Colorado trial court's forced-access order in this case would not have survived under the standard adopted by the *en banc* Fifth Circuit in *Bernard*. However, on review, this Court effectively vacated the First Amendment holding of the Fifth Circuit and held instead that the First Amendment restraint in that case constituted an abuse of Fed. R. Civ. P. 23. In so doing, this Court expressly reserved ruling on the question of the extent to which a trial court in a class action setting can burden litigants' First Amendment rights. *Bernard*, 452 U.S. at 101 n.15. This case offers this Court the opportunity to address this important question.[10]

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[10] The First Amendment issue in *Bernard* involved communications between plaintiffs' counsel and prospective members of the plaintiffs' class. The First Amendment prohibitions at issue here involve a mandate that the defendant transmit communications of plaintiffs' counsel to that counsel's prospective

Because of this vacuum in First Amendment jurisprudence, there is confusion among the lower courts over the extent to which litigants' First Amendment rights can be impaired by the class action process. In *In re School Asbestos Litigation*, 842 F.2d 671 (3d Cir. 1988), the Third Circuit considered a First Amendment challenge by a group of defendants to a trial court order restricting the defendants' right to speak. While the court relied upon the First Amendment to secure jurisdiction over the case under *Cohen*, *id.* at 677-79, it struck down the restriction based upon this Court's analysis in *Bernard*. In *Kleiner*, 751 F.2d 1193 (11th Cir. 1985), the Eleventh Circuit took a very narrow view of what this Court said in *Bernard*, *id.* at 1205, and upheld restrictions on a class action defendant's speech with its customers by relying upon a characterization of the defendant's conduct as "commercial speech." *Id.* at 1203-04 & n.22. *See also supra* at 15-17. Here, the Colorado Supreme Court followed an erroneous application of the commercial speech doctrine in holding that the trial court had the authority under Colo. R. Civ. P. 23 to order Mountain Bell to disseminate plaintiffs' notice.

The issue of class action litigants' First Amendment rights is of major importance to all corporations which regularly communicate with their customers. The lifeblood of any corporation is its relationship with its customers. Every year, American corporations spend billions of dollars on consumer research, advertising,

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clients through the defendant's billing envelopes. As this Court has stated time and again, the right to speak and the right not to speak are identical for First Amendment purposes. *See PG&E*, 475 U.S. at 16 ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

and various public relations activities—all designed to preserve and enhance the corporation-consumer relationship. Because that relationship is formed through consumers' perceptions, and those perceptions are based upon the information consumers receive, corporations carefully scrutinize customer communications to insure that they will promote consumer goodwill for the company.

The form of customer communication at issue in this case is the monthly bill. Every month, Mountain Bell sends over 1.4 million bills to its Colorado customers. The bill is one of the primary means by which Mountain Bell communicates to its customers information about the company and its services. Similarly, monthly billings are an important method of communication for numerous businesses throughout the country. For example, credit card companies, retail stores, banks, other financial service providers, and public utility companies all depend on their monthly bills as an important means of communicating with their customers. All such businesses would be vitally interested in and affected by the Colorado Supreme Court's ruling in this case.

While customer communications are vital to the corporation-consumer relationship, this Court has not addressed their importance, particularly as they relate to corporations' First Amendment rights. *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, in 1980, and *PG&E*, in 1986, recognized, respectively, the right of corporations to speak and their right not to disseminate the views of others with which they disagree. The First Amendment right at issue here, however, involves more than Mountain Bell's right not to disseminate plaintiffs' views that

the company violated antitrust and consumer protection laws and defrauded its customers. This case also involves Mountain Bell's right to control the way in which it communicates with its customers to avoid prejudicing its relationships with them. Although class actions under Rule 23 may be important to the vindication of certain rights and the expeditious handling of certain cases, it does not follow that the First Amendment rights of the parties must be sacrificed or even diminished during the course of such proceedings. That is, however, the direct result of the Colorado Supreme Court's ruling below which failed properly to reconcile, as it easily could have, this Court's ruling in *PG&E* and its footnote in *Oppenheimer*.

Because of its failure to utilize readily available alternative means of communication—having the plaintiffs mail the class notice in their *own* envelopes—the Colorado Supreme Court interfered with Mountain Bell's First Amendment right not to convey a message with which it disagrees and which will injure the company's relations with its own customers. For these reasons, this case raises a substantial national issue involving the fundamental constitutional rights of Mountain Bell and numerous other similarly situated parties.

CONCLUSION

Petitioner prays that this Court grant its Petition for Writ of Certiorari to the Colorado Supreme Court and reverse the judgment below.

Respectfully submitted,

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September 29, 1989

APPENDIX

APPENDIX A

SUPREME COURT, STATE OF COLORADO
July 24, 1989

NO. 88SA439

MOUNTAIN STATES TELEPHONE and TELEGRAPH CO., d/b/a MOUNTAIN BELL, A COLORADO CORPORATION,
Petitioner,

v.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO, and THE HONORABLE WILLIAM G. MEYER, ONE OF THE JUDGES THEREOF,
Respondents.

Original Proceeding

EN BANC

RULE DISCHARGED

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CHIEF JUSTICE QUINN delivered the Opinion of the Court.

In this original proceeding filed by Mountain States Telephone & Telegraph Company, now known as U.S. West Communications (hereinafter referred to as Mountain Bell), we are asked to determine the validity of an order of the Denver District Court directing Mountain Bell to provide space in its monthly billing envelopes for notices of a pending class action brought against Mountain Bell by some of its customers. We issued a rule to show cause, and we now discharge the rule.

I.

Five individual customers and one corporate customer of Mountain Bell filed a class action complaint against Mountain Bell in the Denver District court. The suit was brought on behalf of all Colorado Mountain Bell customers, numbering approximately 1.2 million residential and 235,000 business customers, who have been charged for inside wire maintenance service since 1982.[1] Inside wire maintenance involves repairs to telephone wiring within the customer's home or place of business.

After stating that the representative plaintiffs satisfied prerequisites for a class action mandated by C.R.C.P. 23(a) and (b)(3), the complaint alleged the following pertinent facts. Prior to 1982, inside wire maintenance service was routinely provided by Mountain Bell, but in 1982 the Federal Communications Commission (FCC) issued an order requiring separate billing for component services that tra-

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[1] The class in this case consists of all Mountain Bell customers in Colorado between 1982 and August 25, 1988, and thus is broad enough to include members of this court and other trial and appellate judges. Under these circumstances, the rule of necessity prevails over any conceivable basis for disqualification and requires this court to address the issue raised in this proceeding, for otherwise the parties would be deprived of access to the only appropriate judicial forum for resolution of their respective claims regarding the validity of the district court's order with respect to notice to the class. *See United States v. Will*, 449 U.S. 200 (1980).

ditionally had been covered by a single service charge. The FCC's order was calculated to permit customers to choose among various services offered by their local utility. Following the FCC order, Mountain Bell notified its customers that it would assume each customer wished to continue inside wire maintenance unless Mountain Bell was notified that the service should be discontinued. Silence on the part of the customer, in other words, was deemed by Mountain Bell to be an acceptance of continued inside wire maintenance service.

The complaint stated that Mountain Bell, in utilizing this form of "negative option" contract, engaged in an illegal restraint of trade in violation of the Colorado antitrust statute, §§ 6-4-101 to -109, 2 C.R.S. (1973 and 1988 Supp.); that Mountain Bell made false or misleading statements of fact concerning the nature, quality, and cost of the inside wire maintenance service in violation of the Colorado Consumer Protection Act, §§ 6-1-101 to -115, 2 C.R.S. (1973 and 1988 Supp.); that Mountain Bell's "negative option" contract was invalid and its customers were entitled to restitution of all amounts paid for inside wire maintenance service; that Mountain Bell breached the duty of good faith and fair dealing to its customers by failing to fully and adequately explain the inside wire maintenance service contract; and that Mountain Bell defrauded its customers by concealing or negligently misrepresenting material facts concerning the contract. The plaintiffs requested relief in the form of actual and punitive damages, interest, attorney fees, and an injunction prohibiting Mountain Bell from charging for inside wire maintenance service unless and until the company fully disclosed the service plan to the customer and the customer actually assented to the plan.

Mountain Bell answered the complaint by denying all allegations of liability and raising several affirmative defenses, including the statute of limitations and laches, accord and satisfaction, settlement and release, res judicata

and collateral estoppel, the Noerr-Pennington doctrine,[2] several jurisdictional defenses, and setoff. Mountain Bell also counterclaimed for the reasonable value of inside wire maintenance service provided to customers pursuant to the service contract. The class plaintiffs denied the allegations of the counterclaim.

The representative plaintiffs requested the court to certify the case as a class action and the court granted the plaintiffs' application, finding as follows: that the plaintiffs had adequately demonstrated that the class is sufficiently large to render joinder impracticable; that there are questions of law and fact common to all members of the class; that the plaintiffs' claims are typical of the claims of the other class members; that the plaintiffs have selected qualified counsel to prosecute the claims; that the factual and legal issues common to the members of the class predominate over any question affecting any individual member of the class; and that, inasmuch as the average claim is between $35 and $50 the largest is $150, a class action is superior to any other form of litigation for resolving the controversy.

After certifying the case as a class action, the court conducted a hearing on the question of notice to class members. At the hearing the representative plaintiffs advised the court that the cost of individual notice by first-class mail would be in excess of $500,000, and urged the court to direct that notice to class members be accomplished by permitting the plaintiffs to enclose notices of

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[2] The Noerr-Pennington doctrine prohibits antitrust prosecution under the Sherman Act for genuine efforts to influence the passage and enforcement of laws, regardless of intent or purpose, even where the intent is to eliminate competition. *See United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-70 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-40, 142-44 (1961); *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1365-66 (Colo. 1984).

the pending litigation in Mountain Bell's monthly billing envelopes. The plaintiffs acknowledged that they would be responsible for the cost of copying the notice, the cost of enclosing the notices in the envelopes, which was estimated to be between $25 and $42 per thousand envelopes, and any incidental mailing expenses over and above the postage associated with the monthly billing statements. The plaintiffs estimated that, based on the assumption that class notices would be mailed to all of Mountain Bell's residential and business customers, their proposal for providing notice would result in a cost saving to them of approximately $200,000. Over Mountain Bell's objection, the court ordered Mountain Bell to provide space in its monthly billing envelopes for the mailing of notices to class members, with the incremental costs associated with the copying of the notice, the enclosing of the notice in the billing envelopes, and any additional postage charges to be paid by the representative plaintiffs.

The notice which the court directed to be mailed to Mountain Bell customers informs the customer that the court has certified the pending litigation as a class action and describes the class as follows:

> All persons and entities who have been telephone customers of Mountain Bell in Colorado any time since the Federal Communications Commission unbundled inside wire maintenance service in 1982 and who have been charged fees pursuant to Mountain Bell's optional inside wire maintenance service program at any time between the date that optional service took effect and August 25, 1988.

The notice contained the following description of the lawsuit and the effect of the court's ruling on class certification:

The Case

Plaintiffs sued Mountain Bell, now doing business as U.S. West Communications ("U.S. West"), alleging that U.S. West acquired and maintains a monopoly over the market for inside wire maintenance and repair services contrary to Colorado antitrust law. Plaintiffs also allege that the inside wire maintenance contracts are void or voidable because of fraud practiced by U.S. West and under principals [sic] of contract law and Colorado deceptive practices law. Plaintiffs have asked for damages and injunctive relief against U.S. West. U.S. West has denied all these claims and charges.

U.S. West has filed a counterclaim against certain members of the class, asserting that if it is required to refund charges paid by subscribers to the inside wire maintenance programs, then it is entitled to recover the value of service calls made to customers who have had their inside wire, including their telephone jacks, serviced or repaired by U.S. West at any time from the date that optional inside wire maintenance service first took effect through August 25, 1988. U.S. West claims that, for certain class members, recovery on its counterclaim may exceed Plaintiffs' recovery against it. Plaintiffs have denied U.S. West's counterclaim or that recovery by U.S. West on its counterclaim might exceed Plaintiffs' recovery against U.S. West.

Class Action Ruling

Without expressing its views concerning the merits of Plaintiffs' claims or U.S. West's counterclaim, the Court has ruled that this lawsuit may proceed as a claim for damages and punitive

damages, injunctive relief, attorneys' fees and costs, not only by the Plaintiffs but also on behalf of the class as defined above. The Court also has ruled that the Plaintiffs named in the caption above may act as representatives of the class and their attorneys, Robert J. Dyer, III, George Gary Duncan, James A. Shpall and Lawrence Walner, may act as counsel for the class.

Establishment by the Court of this class does not mean that any money or injunctive relief will be obtained for U.S. West's inside wire maintenance and repair service customers, for these are contested issues which have not been decided. Rather, the ruling means that the ultimate outcome of this lawsuit—whether favorable to the Plaintiffs or to U.S. West—will apply in like manner to the class members; that is, all U.S. West inside wire maintenance and repair service customers described above who do not timely elect to be excluded from the class.

The notice also informed customers that they could elect to be excluded from the class by signing and returning an enclosed "Exclusion Request" and thereby not share in any recovery that might be paid to customers or be subject to Mountain Bell's counterclaim, or, alternatively, they could elect to be included in the lawsuit by not returning the "Exclusion Request."[3]

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[3] The election portion of the notice stated:

Election by Class Members

If you fit the above description of a Plaintiff class member, you have a choice whether or not to remain a member of the class. Either choice will have its consequences, which you should understand before making your decision.

If you want to be excluded from the plaintiff class and taken out of this lawsuit, you must complete the enclosed

Mountain Bell thereafter filed this original proceeding. Mountain Bell contends that the court's order with respect to notice violates its First Amendment rights under the

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> form ("Exclusion Request") and return it to District Court Clerk's Office, City and County Building, 1437 Bannock Street, Denver, 80202, by mail postmarked no later than _____, 19__.
>
> By making this election to be excluded, (1) you will not share in any recovery that might be paid to U.S. West customers as a result of trial or settlement of this lawsuit; (2) you will not be subject to U.S. West's counterclaim; (3) you will not be bound by any decision of this lawsuit favorable to U.S. West; and (4) you may present any claims you have against U.S. West by filing your own lawsuit or you may seek to intervene in this lawsuit.
>
> *If you want to remain a member of the plaintiff class and be included in this lawsuit*, you should NOT file the "Exclusion Request" and *you are not required to do anything at this time.*
>
> By remaining a class member, any claims against U.S. West for damages as alleged in the Complaint will be determined in this case and cannot be presented in any other lawsuit.

The notice also contained a section dealing with the rights and obligations of class members, which stated:

> *Rights and Obligations of Class Members*
>
> If you remain a member of the class:
>
> Plaintiffs and their attorneys will act as your representatives and counsel for the presentation of the charges against U.S. West. If you desire, you may appear by your own attorney. You may also seek to intervene individually and may advise the Court if at any time you consider that you are not being fairly and adequately represented by Plaintiffs and their attorneys.
>
> Your participation in any recovery which may be obtained from U.S. West through trial or settlement will depend upon the results of this lawsuit. If no recovery is obtained for the class, you will be bound by that result also. Your lia-

United States Constitution because the order requires Mountain Bell to make its billing envelopes accessible to a group of persons with which Mountain Bell disagrees for the purpose of disseminating a message antagonistic to Mountain Bell's interests, and thereby associates Mountain Bell with the undesirable message; and that, alternatively, even if the court could legitimately curtail Mountain Bell's First Amendment interests by an order regarding notice, the order in this case was not narrowly tailored to serve any compelling or other significant interest of the state.

II.

Before examining the merits of Mountain Bells' First Amendment claims, it will be helpful to review the procedural requirements for class action certification, and also to consider whether it is ever appropriate to require a defendant in a class action to perform the task of mailing class notices to members of the class.

A.

The basic purpose of a class action is to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit. This purpose is realized by permitting one

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bility, if any, on U.S. West's Counterclaim will depend on the results of this lawsuit.

You may be required as a condition to participating in any recovery through settlement or trial to present evidence respecting your status as a U.S. West customer.

You will be entitled to notice of any ruling reducing the size of the class and also to notice of, and an opportunity to be heard respecting, any proposed settlement or dismissal of the class claims.

or more members of the class to sue or be sued on behalf of all class members. Given the representative nature of the class action, due process considerations require that adequate notice of the action be given to class members, for only in this way can the binding effect of any judgment, whether favorable or unfavorable, be fairly extended to class members. *See generally Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1394-1416 (1976).

Rule 23 of the Colorado Rules of Civil Procedure, which is virtually identical to Fed. R. Civ. P. 23, provides the procedural standards for the filing and maintenance of a class action. Since Fed. R. Civ. P. 23 is the model for the Colorado counterpart of the rule, we properly may give considerable deference to the federal interpretation of Fed. R. Civ. P. 23 in our analysis of the Colorado rule. *E.g., Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 n.3 (Colo. 1982).

C.R.C.P. 23(a) permits one or more members of a class to sue or be sued as representative parties on behalf of all only if:

> (1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

A case is maintainable as a class action if, in addition to satisfying the four prerequisites of C.R.C.P. 23(a), the claim falls within one of the following categories of C.R.C.P. 23(b):

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) The difficulties likely to be encountered in the management of class action.

C.R.C.P. 23(c) requires the court to determine as early as practicable after the commencement of the action whether the case is to be maintained as a class action. "The decision of whether to certify a class action lies within the discretion of the trial court and will not be disturbed unless the decision is clearly erroneous and an abuse of discretion." *Friends of Chamber Music v. City and County of Denver*, 696 P.2d 309, 317 (Colo. 1985). An order certifying a case as a class action may be conditional and subject to amendment before the final decision on the merits of the case. C.R.C.P. 23(c)(1).

If the court certifies the case as a class action and the class action is maintained pursuant to C.R.C.P. 23(b)(3) (predominance of questions of fact or law common to class members and superiority of class action over other forms of adjudication), C.R.C.P. 23(c)(2) requires the court to direct to members of the class "the best notice practicable under the circumstances, including individual notice to all members who can be identified through a reasonable effort." C.R.C.P. 23(c)(2) further provides:

> The notice shall advise each member that: (A) The court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

A class member who opts out of a class is not bound by a judgment unfavorable to the class and may not participate in the benefits of a favorable judgment. R. Hardaway and S. Hyatt, 4 *Colorado Practice* 242 (1985). When a lawsuit is maintained as a class action, C.R.C.P. 23(c)(3) requires the judgment to include and describe those whom the court finds to be members of the class and also to

include and specify those to whom notice was directed who have not requested exclusion and are still members of the class.

C.R.C.P. 23(d) authorizes the court to make appropriate orders designed "for the protection of members of the class or otherwise for the fair conduct of the case" and to impose conditions on the representative parties to the action. The court's authority under Rule 23(d) includes the power to order one of the parties to perform the tasks necessary to notify members of the class of the impending lawsuit. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 (1978).

B.

The mandatory notice provisions of C.R.C.P. 23(c)(2) are designed to fulfill due process requirements to which the class action procedure is subject, since without such notice class members might be unaware of litigation affecting their rights and obligations. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173-74 (1974). In order to ensure adequate notice to the class, the notice must be given to each identifiable class member. *Id.* at 175.

In *Oppenheimer Fund*, 437 U.S. 340, the United States Supreme Court held that as a general rule the representative plaintiff should perform the tasks necessary for notification, since it is the plaintiff who seeks to maintain the suit as a class action and to represent other members of the class, but that in some instances "the defendant may be able to perform a necessary task with less difficulty or expense than could the representative plaintiff." 437 U.S. at 356. In these latter instances, a court is vested with discretion under Rule 23(d) to order the defendant to perform tasks necessary to notification. *Id.* at 355-56. Since identification of class members is simply "another task that must be performed in order to send notice,"

Fed. R. Civ. P. 23(d), in the Court's view, "authorizes a district court in appropriate circumstances to require a defendant's cooperation in identifying the class members to whom notice must be sent." *Id.* at 355.

In cases where a court properly decides that the defendant, rather than the representative plaintiff, should perform a task necessary to notification, the question arises as to which party should bear the expense of notification. Since it is the representative plaintiff who seeks to maintain the suit as a class action, the general rule is that the plaintiff should bear the costs relating to the sending of notice, although here again, as the Supreme Court recognized in *Oppenheimer Fund*, 437 U.S. at 358-59, there may be special circumstances which militate against shifting the cost of notification to the representative plaintiff. In some cases, for example, "the expense involved may be so insubstantial as not to warrant the effort required to calculate it and shift it to the representative plaintiff." *Id.* at 359. In other instances it may be appropriate to leave the cost of notification where it presently is "because the task ordered is one that the defendant must perform in any event in the ordinary course of its business." *Id.* *Oppenheimer Fund* thus stands for the proposition that in a case where a defendant can perform the task of sending notices to class members by simply enclosing the notices in the defendant's periodic mailings to class members, at no additional or at most insubstantial expense to the defendant, a court is certainly justified in requiring the defendant, rather than the representative plaintiff, to perform the task of mailing the class notices to class members.

Based on the Supreme Court's analysis of Fed. R. Civ. P. 23 in *Oppenheimer Fund*, 437 U.S. 340, we are satisfied that, although ordinarily the representative plaintiff should bear all costs relating to the sending of the notice of the class action, there are cases in which it is appropriate to relieve the plaintiff of the burden of such costs and to

require the defendant to perform the task of sending the class notices to class members. Putting aside for the present the First Amendment claim raised by Mountain Bell, the litigation involved in this proceeding appears to be such a case. Because the representative plaintiffs in the class action would incur such substantial costs in mailing the notices as to possibly preclude the litigation entirely, and because Mountain Bell has the ability to notify the class members, at no significant additional expense to itself, by merely enclosing the class notices in billing envelopes routinely sent to its customers, the district court acted within the discretion granted to it by C.R.C.P. 23(d) when it required Mountain Bell to send the notices of the class action to the class members.

III.

We turn now to Mountain Bell's argument that the court's order regarding notice violates the company's First Amendment rights under the United States Constitution because the order requires Mountain Bell to make its billing envelopes accessible to a group of persons with which it disagrees for the purpose of disseminating a message antagonistic to its own interests, and thereby associates Mountain Bell with the message. We are unpersuaded by Mountain Bell's argument.

A.

The First Amendment guarantee of free speech protects not only the voluntary expression of ideas but also the right not to express those ideas publicly. *Harper and Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985). Because the identity of the speaker is not decisive in determining the scope of First Amendment protections, it necessarily follows that corporations as well as individuals are entitled to the protections of the First Amendment. *First National Bank of Boston v. Bellotti*, 435 U.S.

765, 784-85 (1978). This protection obviously extends to a government-regulated public utility. *Pacific Gas and Electric Corp. v. Public Utilities Commission*, 475 U.S. 1, 8 (1986); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 533-35 (1980).

The protections of the First Amendment applicable to speech dealing with commercial transactions, however, are less extensive than those applicable to noncommercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980). The government may place restrictions on commercial speech, including requirements dealing with the amount and quality of information which a business entity must make available to consumers, as long as such restrictions are reasonably related to a substantial governmental interest. *See Board of Trustees of State University of New York v. Fox*, 57 U.S.L.W. 5015 (U.S. June 29, 1989) (restriction on commercial speech need only be reasonably related to substantial governmental interest—that is, the fit need not be the single best disposition but one whose scope is in proportion to the interest served); *Zauderer*, 471 U.S. 626 (requirement that attorneys who advertise for contingent fee cases disclose client's obligation to pay costs and expenses not violative of First Amendment rights of attorneys, since such disclosure is reasonably related to state's substantial interest in preventing deception to consumers). There can be no doubt that the interest of the state in eliminating the adverse consequences of repetitious litigation involving basically identical issues by providing potential class members with adequate notice, consistent with due process of law, of the appropriate procedure for resolving their claims in one pending lawsuit, or be forever barred from later asserting these claims, is indeed substantial. Thus, while a company such as Mountain Bell, which is engaged in the business of selling utility services to the public, is not without some constitutionally protected

interest in the contents of a court-ordered notice of a class action involving a commercial transaction between the company and its customers, the extent of constitutional protection accorded that interest certainly can be no greater than the protection applicable to commercial speech.

B.

Mountain Bell's First Amendment rights are not violated by the respondent court's order regarding notice. To be sure, the order requires Mountain Bell to provide the representative plaintiffs with access to its billing envelopes for purposes of notifying the class members of the pending litigation. Requiring Mountain Bell to enclose the class notices in their billing envelopes, however, is the very type of order contemplated by C.R.C.P. 23(c)(2), which mandates that the court "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Such notice does no more than provide Mountain Bell customers with factually accurate information with respect to their right to join in or be excluded from pending litigation over inside wire maintenance service—a matter directly bearing on the commercial relationship between Mountain Bell and its customers—and is reasonably related to the substantial governmental interest of providing a fair and cost-effective method for resolving a multitude of claims involving common issues of fact or law in one lawsuit, thereby preventing the unnecessary waste of judicial resources in repetitious litigation.

We recognize that under some circumstances controlled access to a company's billing envelopes for purposes of transmitting a message antagonistic to the interests of the company might impermissibly abridge the First Amendment rights of the company. There is nothing about the nature or content of the notice in this case, however, that

is violative of Mountain Bell's right to free speech. The notice involved here is a message from the court, calculated to inform Mountain Bell customers of the nature of the pending litigation in which the customers might have some interest. Mountain Bell may protest and contest the filing of the lawsuit, but it has no basis to disagree with the fact that a class action complaint has been filed against it by some of its customers. The content of the notice clearly and succinctly sets forth the claims of the representative plaintiffs, Mountain Bell's denial of these claims and its counterclaim, and the options available to Mountain Bell customers as members of the class. There is no danger under these circumstances that a customer would somehow construe the notice as an endorsement by Mountain Bell of the class action or a concession on its part that the pending lawsuit has merit. Neither the court's order on notice nor the notice itself places Mountain Bell in the position of associating with the allegations of the complaint or with any message with which it disagrees.

While the First Amendment does not distinguish between a compulsion to respond to statements of fact and a compulsion to respond to an opinion, *Riley v. National Federation of the Blind*, ___ U.S. ___, ___, 108 S. Ct. 2667, 2677-78, 101 L. Ed. 2d 669, 689-90 (1988), the plain fact is that the class action notice does not place Mountain Bell under a compulsion to respond to any aspect of the notice. The notice merely provides class members with objectively neutral information relevant to pending litigation affecting public utility customers and does not place Mountain Bell in a situation of being compelled to respond to a message when it might otherwise have preferred to remain silent.[4]

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[4] Mountain Bell cites DR 7-104 to support its claim that it is powerless to respond freely to the class action notice because of restrictions placed on communications between parties to impending litigation. On its face, DR 7-104 applies only to contacts between attorneys and opposing

C.

Mountain Bell places much reliance for its argument on the plurality opinion of Justice Powell in *Pacific Gas and Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986). When we analyze Justice Powell's opinion against the backdrop of the factual circumstances of that case, however, it is quite obvious that Mountain Bell's reliance is misplaced.

In *Pacific Gas and Electric*, the Supreme Court considered whether the California Public Utilities Commission could require a private utility company to include in its billing envelopes the messages of a third party, a consumer interest group named Toward Utility Rate Normalization (TURN), with which the utility disagreed. The California Public Utilities Commission had ruled that the extra space in the utility's billing envelopes belonged to the ratepayers

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parties:

> *Communicating With One of Adverse Interest.*
>
> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Mountain Bell also argues that it is powerless to respond freely to the class members because as a class action defendant it is prohibited from communicating with the class members on an *ex parte* basis regarding the substance of the lawsuit. Without deciding whether Mountain Bell is correct in its assumption, we merely point out that any such restrictions, to the extent that they might be applicable at all, would apply regardless of whether or not the class notice is mailed in Mountain Bell's billing envelopes. Any asserted limitations on Mountain Bell's ability to communicate with its customers on the class action, in other words, would arise from the nature of the class action litigation and the litigation posture of the parties, and not from the district court's order on notice.

and that this space should be apportioned between the public utility and its customers by permitting TURN to use the space four times a year for two years, with no restrictions placed on the content of TURN's messages except a statement to the effect that the messages were not those of the public utility. In vacating the commission's order, the plurality of the Court initially noted that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." 475 U.S. at 9. The plurality then went on to conclude that the commission's order was inconsistent with the First Amendment rights of the public utility in several particulars: it was not content-neutral, in that it discriminated on the basis of the viewpoints of the members of TURN, which were expressly contrary to the views of the public utility; it impermissibly required the public utility to associate with a message with which it disagreed and to use its property to disseminate the message; and the order burdened the free speech rights of the public utility, but was not narrowly tailored to serve any compelling state interest. In the course of his opinion, however, Justice Powell expressly acknowledged that the commission's order was readily distinguishable from orders requiring a public utility to carry "various legal notices," noting that a state "has substantial leeway in determining appropriate information disclosure requirements for business corporations." 475 U.S. at 15 n.12.[5]

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[5] The plurality opinion's exceptions for legal notices are reinforced in a concurrence and a dissent to *Pacific Gas and Electric*. Justice Marshall recognized the State has a compelling interest in requiring utilities "to carry messages concerning utility ratemaking and the rights of utility customers." 475 U.S. at 23 n.2 (Marshall, J., concurring in the judgment). Justice Stevens also assumed the plurality would permit regulations requiring a utility "to disseminate legal notices of public hearings and ratemaking proceedings." 475 U.S. at 38. (Stevens, J.

The facts of the instant case are significantly different from those in *Pacific Gas and Electric*.[6] The notice in this case is devoid of economic, ideological, or political advocacy. What we are dealing with here is a legal notice emanating from the court—a notice not only authorized but expressly required by C.R.C.P. 23(c)(2). The notice simply advises Mountain Bell customers of the pending class action and gives them necessary information and direction regarding their right to be excluded or included as members of the class. In short, the notice contains the very type of information contemplated by C.R.C.P. (23)(c)(2) and is reasonably related to the substantial interest of the state in providing adequate notice to class members of a fair and cost-effective method for resolving their claims.

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dissenting).

Mountain Bell argues that the legal notices to which the court refers in *Pacific Gas and Electric*, 475 U.S. 1, are markedly different from class notices because the legal notices are not adversarial in nature. We are not persuaded by this purported distinction. Proceedings before the Public Utilities Commission can be highly adversarial. The commission may, upon its own motion or on complaint, hold a hearing to investigate rates or practices of a public utility in order to determine whether the rates are "unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law." § 40-3-111(1), 17 C.R.S. (1984). Although such a hearing might well be adverse to Mountain Bell's interests, Mountain Bell concedes that it would be required to disseminate notice of such proceedings to its customers.

[6] Mountain Bell also relies on *Central Illinois Light Co. v. Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987), to support its argument. That case involved an Illinois state law (CUB Act) requiring utilities to enclose Citizens Utility Board messages soliciting membership and dues in monthly billing envelopes. The court of appeals, citing *Pacific Gas and Electric*, 475 U.S. 1, found the forced enclosures violated the utilities' First Amendment rights, noting the CUB Act was in all material respects "constitutionally indistinguishable from the PUC order struck down by the Court in *Pacific Gas*." 827 F.2d at 1174. We conclude that *Central Illinois Light* is not dispositive in the instant case for the same reasons that *Pacific Gas and Electric* is not controlling.

IV.

We need not labor long over Mountain Bell's alternative argument that, even if the district court could have permissibly burdened Mountain Bell's free speech rights by requiring it to perform some of the tasks necessary to effectuate notice to class members, the court's order in this case was made out of a concern for the economic interest of the plaintiffs and was not narrowly tailored to serve any compelling or other significant interest of the state. We find this argument unavailing for several reasons.

Mountain Bell's argument assumes that a court is prohibited from weighing the expense factor in resolving the appropriate form of notice to class members. As *Oppenheimer Fund* makes clear, a court may properly consider the cost of effectuating notice and may determine that the expense involved is "so insubstantial as not to warrant the effort required to calculate it and shift it to the representative plaintiff." 437 U.S. at 359. Mountain Bell also incorrectly assumes that its rights of free speech were burdened by the order entered in this case. As we have already discussed, the district court's order regarding notice is expressly authorized by C.R.C.P. 23(c)(2) and is reasonably related to the state's substantial interest in providing a fair and cost-effective method for resolving class action litigation. Finally, since we are dealing here with a legal notice directed by the court to class members—and not with economic, ideological, or political advocacy emanating from a third party and expressly contrary to the views of the company ordered to mail the message to its customers—the "strict scrutiny-compelling state interest" analysis employed by the Supreme Court in *Pacific Gas & Electric* is not the controlling standard for resolving this case. *See Board of Trustees of State University of New York*, 57 U.S.L.W. 5015.

In light of the fact that the basic purpose of class action litigation is to provide a fair and economical method for permitting a multitude of claims affecting a large number of persons to be litigated in one lawsuit, we view the district court's order on notice as one capably fashioned in a manner that, on the one hand, effectively provides members of the class with notice of pending litigation that might well affect their legal interests and, on the other hand, does not infringe on the legitimate First Amendment interests of Mountain Bell. We thus conclude that, under the particular circumstances of this case, the district court did not err in requiring Mountain Bell to provide space in its monthly billing envelopes for class notices concerning the pending litigation. The rule to show cause is accordingly discharged.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
ORIGINAL PROCEEDING, DISTRICT COURT, DENVER COUNTY, #87CV23146

CASE NO. 88SA439

ORDER OF COURT

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a MOUNTAIN BELL, A COLORADO CORPORATION,
Petitioner,

vs.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO, and THE HONORABLE WILLIAM G. MEYER, ONE OF THE JUDGES THEREOF,
Respondents.

Upon consideration of the Motion to Stay Issuance of Mandate and the Objection to Stay Issuance of Mandate filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Motion to Stay Issuance of Mandate shall be, and the same hereby is, GRANTED and issuance of Mandate to be stayed for thirty (30) days. Any further stay must be obtained from the U.S. Supreme Court.

BY THE COURT, AUGUST 11, 1989.

Supreme Court
State of Colorado
Certified to be a full true and correct copy

AUG 16 1989

MAC V. DANFORD
Clerk of the Supreme Court

Court Seal By /s/ Delsa B. Demlow
Deputy Clerk

APPENDIX C

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

CIVIL ACTION NO. 87 CV 23146 (88 CV 2343), Courtroom 18

REPORTER'S TRANSCRIPT

GORDON C. HAM, EDWARD J. DENNIS, ALL WESTERN SALES AND LEASING, INC., ROBERT KENDALL, NOEL HARRIS and WALL STREET INSURANCE, INC.,

Plaintiffs,

vs.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a MOUNTAIN BELL, a Colorado corporation,

Defendant.

SAM SULSKY, individually and on behalf of all Others Similarly Situated,

Plaintiffs,

vs.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a MOUNTAIN BELL, a Colorado corporation,

Defendant.

The above-entitled matter came on for hearing regarding class notice on November 28, 1988, before the HONORABLE WILLIAM G. MEYER, Judge of the District Court.

FOR THE PLAINTIFFS: ROBERT J. DYER III, Reg. No. 5734
JAMES A. SHPALL, Reg. No. 12522
GREG R. GIOMETTI, Reg. No. 16868

FOR THE DEFENDANT: DALE R. HARRIS, Reg. No. 2957
CAROLE K. JEFFREY, Reg. No. 9033

[2] **PROCEEDINGS**

(The following proceedings commenced at 9:04 a.m.)

THE COURT: Calling Case No. 87 CV 23146, which has been consolidated with 88 CV 2343, Gordon C. Ham, et al., versus Mountain States Telephone and Telegraph Company.

Counsel, enter your appearances for the record, please.

MR. DYER: Your Honor, on behalf of plaintiffs, Robert Dyer and Greg Giometti of my law firm and Mr. Jim Shpall of Wolf & Slatkin.

THE COURT: Good morning, counsel.

MR. HARRIS: Good morning, Your Honor. On behalf of the defendant, Mountain Bell, Dale Harris and Carole Jeffery of Davis, Graham & Stubbs.

THE COURT: Good morning, counsel.

This matter comes before the Court for a hearing regarding class notice. The first issue involves the form of the notice. The second issue involves the distribution of the notice. Since it's the plaintiffs that really have the burden of giving notice, we'll let Mr. Dyer or Mr. Shpall or Mr. Giometti proceed at this time.

MR. DYER: Your Honor, as to the form of [3] notice, we don't believe there's any disagreement. In fact, the

* * *

be a case dealing with lawyer advertising, and the court pointed out that the advertisement contained [56] statements regarding the legal rights of persons injured by the Dalkon Shield.

But it went on to say in Footnote 7 at page 635 of 471 U.S.—it said, Appellant's advertising contained statements regarding the legal rights of persons injured by the Dalkon Shield that, in another context, would be fully protected speech. That this is so does alter the status of the advertisements as commercial speech.

The court pointed out that if the lawyer chose to make those statements in a commercial advertisement where he was trying to get business, it was something else. But if it was a pure advice of legal rights, it was a fully protected speech.

Finally, the PG&E case, the *Pacific Gas* case, itself really disposed of the plaintiffs' argument in the rest of the footnote which the plaintiffs never cite, and that is where they said, Nothing in *Zauderer* suggests, however, that the state is equally free to require corporations to carry the messages of third parties where the messages themselves are biased against or are expressly contrary to the corporation's views. I suggest we have that situation here and that the legal notice argument is—should not be accepted. Thank you.

THE COURT: This matter comes before the [57] Court on an issue relating to the giving of class notice and who should bear the expense of giving that notice. The Court directs that the defendant shall make an enclosure in their own billing statement.

And how that cost is to be calculated. Rule 23(c)(2) of the Colorado Rules of Civil Procedure provide in pertinent part, In any class action maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including in-

dividual notice to all members who can be identified through reasonable effort.

The United States Supreme Court in *Oppenheimer Fund v. Sanders*, 437 U.S. 340, at least tacitly recognized that in some situations, and I quote, The courts sometimes have found it appropriate to order a defendant rather than a representative plaintiff to perform tasks other than identification that are necessary to the sending of notice, end quote. And then specifically the Supreme Court in Footnote 22 indicates several cases where federal district courts required defendants to mail notice to members of the plaintiff class.

The court went on to say that the circumstances in which it would be warranted that the defendants perform an obligation that is normally required [58] of the plaintiffs is where the defendants can perform a necessary task with less difficulty or expense than could the representative plaintiff. In the *Oppenheimer Fund* case, the specific issue there was identifying a list of names and addresses of the class members.

Subsequently, in *Pacific Gas & Electric v. California PUC*, 475 U.S., page 1, the United States Supreme Court struck down a decision of the California Public Utilities Commission that required the utility to provide space in its own billings for advertisements by TURN, a group that in large part was against the interests of *Pacific Gas & Electric Company*.

In the *Pacific Gas & Electric Company* case, the Supreme Court noted that the commission's order, meaning the California Public Utilities Commission's order, was thus readily distinguishable from orders requiring appellant to carry various legal notices, such as notices of upcoming commission proceedings or of changes in the way rates are calculated.

The plaintiffs assert that this notice of class action proposed in this particular case is, in fact, a legal notice.

Defendants assert that it is clearly not a legal notice but is, rather, a notice that really advocates a particular point of view, that point of view being one that is not in coincidence with that advocated [59] by the defendants; that the court, by requiring, if the court does require, the defendants to carry such a notice in their own billing, is selecting a speaker, that it literally forces a response by the defendants.

According to both case law and Code of Professisonal Responsibility, they cannot respond, because to do so would constitute an ex parte communication with members of the plaintiff class. For the court to require the defendants to carry such a notice in their bill would require the defendants to associate with speech that they specifically disagree. And it also would require the defendants to use their own property—namely, the envelopes—to publish hostile views.

The Court has reviewed the notice itself, and the Court does believe, number one, that it's really the Court's notice, not the plaintiffs' notice. The notice itself is nonadvocacy in tenor. It states mere facts. It states that specifically the defendant disagrees with these facts and specifically that the defendants not only disagree with the facts but have a counterclaim against the facts. I don't agree with plaintiffs' counsel that, in fact, the notice benefits the defendants. But at the same time, I believe it's the type of notice that is permitted under *Pacific Gas & Electric* as a legal notice.

The Court cannot see a substantial difference [60] between a notice of class action lawsuit and a notice of a hearing. What it does is inform individual customers of the defendant that a certain thing is occurring and they can either decide to participate or not decide to participate. Notice of a hearing does the same thing. That type of notice was specifically approved in the *Pacific Gas & Electric v. California PUC* case.

I would note also in the *Central Illinois Light Company v. Citizen Utility Board* case, 827 F.2d 1169, in discussing *Zauderer*, which the *Pacific Gas & Electric* case cited, using the specific cite there, nothing in *Zauderer* suggests, however, that the state is equally free to require corporations to carry messages of third parties where the messages themselves are biased against or expressly contrary to the corporation's views.

In this Court's opinion, the message contained in the notice of class action is, number one, not biased nor is it expressly contrary to the corporation's views. The corporation's views are, in this Court's opinion, contained within the notice of the class action in the portion referring to the case. The corporation's views are that they are specifically denying these allegations and asserting that they have certain counterclaims.

The Court does feel that the test has been [61] met in *Oppenheimer*. The unrebutted statements of counsel that it will cost them over half a million dollars to send out the notice versus an expense to the defense of somewhere between zero—there, obviously, is some cost—and $42 per thousand to send out the notice leads me to believe that it is appropriate to require the defendant to enclose the class notice within their billing.

As to the expense question, it seems to me that the plaintiffs should bear the expense of mailing, based upon an incremental or actual cost. The amount of that actual cost is estimated to be approximately 1.91 cents per mailing. Although more and hopefully more accurate information will be available in December of 1988, it doesn't seem to me that it's appropriate for the defendants to fund the plaintiffs' costs and that the Court should order the costs be paid at the time of the mailing and not at the conclusion of the case. To rule otherwise would mean that the defendants would be losing the use of whatever cost it was during the pendency of this lawsuit.

So I would ask that the defendants provide a breakout on the costs in January of 1989, by January 15th. Is that sufficient time, Mr. Harris, Ms. Jeffery?

MR. HARRIS: Your Honor, I would believe so.

THE COURT: All right. And we can have a [62] hearing if the plaintiffs contest the actual costs to Mountain Bell in mailing out the class notice.

As it relates to the Court's order, I can enter a stay on my order so you can take an original proceeding, because it seems to me this is the type of issue that you may want to pursue further in the Colorado Supreme Court.

MR. HARRIS: Your Honor, in disappointed anticipation that the Court might rule in the way it has done, I have prepared a motion for stay for that purpose, which I can file with the Court. I would request that we have a week to make a determination as to whether we wish to go to the Supreme Court and, if we do file within that time period, that the stay continue until the Supreme Court decides whether to take it or not and dispose of it.

THE COURT: Counsel, here's how I would suggest we proceed. I will give you a seven-day stay automatically. The only way that you're going to have the matter heard by the Supreme Court is by the issuance of an original proceeding under Rule 21.

MR. HARRIS: Yes, that's correct.

THE COURT: And any further stay, I believe, should be obtained from the Supreme Court. It's my understanding conference is generally Thursday morning. Therefore, unless I hear otherwise, the stay will expire [63] next Tuesday. Now, does that give you sufficient time?

MR. HARRIS: Well, Your Honor, under those circumstances, I'm wondering if we can have a two-week stay. That way we can get our papers in in a week, and the

next conference would come up where they can decide whether or not to give us a stay in connection with our petition so we have two weeks and not have that potential gap there.

THE COURT: Stay will expire December 12, 1988. Is that sufficient time?

MR. HARRIS: That's sufficient time, Your Honor. Thank you very much.

THE COURT: Counsel, I note that defense filed a motion to quash. Is that moot in light of the Court's order?

MR. DYER: Yes, Your Honor. We disagree with their assertion of the 48 hours, but we won't argue it today. We didn't need those people anyway as it turns out.

THE COURT: Counsel, one additional matter that we have to address, and that is the pending motion to compel. As you are aware, I denied the plaintiffs' request for an expedited hearing on motion to compel. I don't know exactly when the time periods run under Rule 121. But I think we ought to set a hearing on the [64] motion to compel at this time.

MR. DYER: Your Honor, I think the standard reply date or number of days is 15 days, if I'm not incorrect. And I can't remember exactly when that was served, so I'm not sure exactly when it would run out.

THE COURT: That's what I can't recollect. I'm aware of the time periods as provided for in Rule 121. But I don't know in this particular case when. And you would—

MR. HARRIS: I'm not a hundred percent sure of this, but I believe that the 15 days would expire on the 2nd of December, this Friday. And Your Honor may recall that in our opposition to their effort for an expedited response date, we requested ten additional days to submit our response in light of the extensive papers that they have filed and the importance of the issues. So we request that we

* * *

APPENDIX D

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 87 CV 23146, Courtroom 18

NOTICE OF CLASS ACTION LAWSUIT

GORDON C. HAM, EDWARD J. DENNIS, ALL WESTERN SALES AND LEASING, INC., ROBERT KENDALL, NOEL HARRIS and WALL STREET INSURANCE, INC.

Plaintiffs,

vs.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a MOUNTAIN BELL, a Colorado corporation,

Defendant.

Case No. 88 CV 2343

SAM SULSKY, Individually and on Behalf of All Other Similarly Situated,

Plaintiff,

vs.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, d/b/a MOUNTAIN BELL, a Colorado corporation,

Defendant.

This Notice May Affect Your Rights.
Please Read Carefully.

TO: All present and former U.S. West Communications, Inc. (formerly Mountain Bell) customers.

YOU ARE HEREBY NOTIFIED that on August 25, 1988, this action was certified as a class action pursuant to Rule 23(b)(3) Colorado Rules of Civil Procedure, the class consisting of:

> All persons and entities who have been telephone customers of Mountain Bell in Colorado any time since the Federal Communications Commission unbundled inside wire maintenance service in 1982 and who have been charged fees pursuant to Mountain Bell's optional inside wire maintenance service program at any time between the date that optional service took effect and August 25, 1988.

The Case

Plaintiffs sued Mountain Bell, now doing business as U.S. West Communications ("U.S. West"), alleging that U.S. West acquired and maintains a monopoly over the market for inside wire maintenance and repair services contrary to Colorado antitrust law. Plaintiffs also allege that the inside wire maintenance contracts are void or voidable because of fraud practiced by U.S. West and under principals of contract law and Colorado deceptive practices law. Plaintiffs have asked for damages and injunctive relief against U.S. West. U.S. West has denied all these claims and charges.

U.S. West has filed a counterclaim against certain members of the class, asserting that if it is required to refund charges paid by subscribers to the inside wire maintenance programs, then it is entitled to recover the value of service calls made to customers who have had their inside wire, including their telephone jacks, serviced or repaired by U.S. West at any time from the date that optional inside

wire maintenance service first took effect through August 25, 1988. U.S. West claims that, for certain class members, recovery on its counterclaim may exceed Plaintiffs' recovery against it. Plaintiffs have denied U.S. West's counterclaim or that recovery by U.S. West on its counterclaim might exceed Plaintiffs' recovery against U.S. West.

Class Action Ruling

Without expressing its views concerning the merits of Plaintiffs' claims or U.S. West's counterclaim, the Court has ruled that this lawsuit may proceed as a claim for damages and punitive damages, injunctive relief, attorneys' fees and costs, not only by the Plaintiffs but also on behalf of the class as defined above. The Court also has ruled that the Plaintiffs named in the caption above may act as representatives of the class and their attorneys, Robert J. Dyer, III, George Gary Duncan, James A. Shpall and Lawrence Walner, may act as counsel for the class.

Establishment by the Court of this class does not mean that any money or injunctive relief will be obtained for U.S. West's inside wire maintenance and repair service customers, for these are contested issues which have not been decided. Rather, the ruling means that the ultimate outcome of this lawsuit—whether favorable to the Plaintiffs or to U.S. West—will apply in like manner to the class members; that is, all U.S. West inside wire maintenance and repair service customers described above who do not timely elect to be excluded from the class.

Election by Class Members

If you fit the above description of a Plaintiff class member, you have a choice whether or not to remain a member of the class. Either choice will have its consequences, which you should understand before making your decision.

- *If you want to be excluded from the plaintiff class and taken out of this lawsuit*, you must complete the enclosed form ("Exclusion Request") and return

it to District Court Clerk's Office, City and County Building, 1437 Bannock Street, Denver, 80202, by mail postmarked no later than _____, 19___.

By making this election to be excluded, (1) you will not share in any recovery that might be paid to U.S. West customers as a result of trial or settlement of this lawsuit; (2) you will not be subject to U.S. West's counterclaim; (3) you will not be bound by any decision of this lawsuit favorable to U.S. West; and (4) you may present any claims you have against U.S. West by filing your own lawsuit or you may seek to intervene in this lawsuit.

- *If you want to remain a member of the plaintiff class and be included in this lawsuit,* you should NOT file the "Exclusion Request" and *you are not required to do anything at this time.*

By remaining a class member, any claims against U.S. West for damages as alleged in the Complaint will be determined in this case and cannot be presented in any other lawsuit.

Rights and Obligations of Class Members

If you remain a member of the class:

- Plaintiffs and their attorneys will act as your representatives and counsel for the presentation of the charges against U.S. West. If you desire, you may appear by your own attorney. You may also seek to intervene individually and may advise the Court if at any time you consider that you are not being fairly and adequately represented by Plaintiffs and their attorneys.
- Your participation in any recovery which may be obtained from U.S. West through trial or settlement will depend upon the results of this lawsuit. If no recovery is obtained for the class, you will be bound by that result also. Your liability, if any, on U.S.

West's Counterclaim will depend on the results of this lawsuit.

* You may be required as a condition to participating in any recovery through settlement or trial to present evidence respecting your status as a U.S. West customer.
* You will be entitled to notice of any ruling reducing the size of the class and also to notice of, and an opportunity to be heard respecting, any proposed settlement or dismissal of the class claims.

Additional Information

NEITHER THIS LAWSUIT NOR THIS LEGAL NOTICE EXCUSE YOUR OBLIGATION TO PAY YOUR PHONE BILL.

Any questions you have concerning the matters contained in this notice should *not* be made to the court but should be directed in *writing* to:

Robert J. Dyer, III, Esq.
825 Logan Street
Denver, Colorado 80203

or

George Gary Duncan, Esq. or
506 Galisteo Street
Santa Fe, New Mexico 87501

James A. Shpall, Esq.
Wolf & Slatkin, P.C.
3773 Cherry Creek Dr. North
745 Ptarmigan Place
Denver, Colorado 80209

or

Lawrence G. Walner, Esq.
Lawrence Walner & Associates
321 N. Clark St., Suite 3150
Chicago, Illinois 60610

You may, of course, seek the advice and guidance of your own attorney if you desire. The pleadings and other records in this litigation may be examined and copied at any time during regular office hours at the office of the District Court Clerk, City and County Building, 1437 Bannock Street, Denver, 80202.

Dated: _____

BY THE COURT:

_____
WILLIAM G. MEYER
DISTRICT COURT JUDGE

REQUEST FOR EXCLUSION FROM CLASS ACTION

Read the enclosed legal notice carefully before filling out this form.

The undersigned does *NOT* wish to remain a member of the plaintiff class certified in the *Ham, et al. v. Mountain States Telephone and Telegraph Co., d/b/a U.S. West Communications, Inc., a Colorado corporation* in the District Court for the City and County of Denver.

Date: _____

_____

Signature

Print name, title and current address of person signing

_____

_____

_____

Print your area code and telephone number(s)

_____

If you want to exclude yourself from the plaintiff class, you must fill in and return this form by mail before _____, 1988 to: District Court Clerk's Office, City and County Building, 1437 Bannock Street, Denver, 80202.

APPENDIX E

APPLICABLE PROVISIONS OF THE UNITED STATES CONSTITUTION, COLORADO LAW, AND FEDERAL PROCEDURAL RULES

United States Constitution, First Amendment provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, ...

Federal Rules of Civil Procedure, Rule 23, provides:

Rule 23. *Class Actions.*

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the cir-

cumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they con-

sider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Colorado Rules of Civil Procedure, Rule 23 is identical to Fed. R. Civ. P. 23, above, except for non-substantial punctuation, occasional inserts of the words "section" or "subsection" before cross-references within the text of the Colorado Rule, and the replacement of the words "the member" in the Federal Rule with the words "him" and "he" in subsection 23(c)(2)(A) of the Colorado Rule.

Colorado Constitution Article VI, Section 3 provides:

Section 3. Original jurisdiction - opinions. The supreme court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be provided by rule of court with authority to hear and determine the same; and each judge of the supreme court shall have like power and authority as to writs of habeas corpus. The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decision of said court.

Colorado Rule of Appellate Procedure, Rule 21, provides:

Rule 21. Procedure in Original Actions

(a) Writs Under Constitution. This Rule applies only to the original jurisdiction of the Supreme Court to issue writs as provided in Section 3 of Article VI of the Colorado Constitution as amended. (See Rule 106, C.R.C.P., for remedial writs in the district court.) Relief in the nature of prohibition may be sought in the Supreme Court where the district court is proceeding without or in excess of its jurisdiction or where the district court has granted or denied change of venue in actions in rem or in actions where the statute prescribes the forum.

(b) Docketing of Petition and Fees; Form of Pleadings; Briefs. Upon the filing of a petition for relief under this rule, petitioner shall pay to the clerk of the appellate court a docket fee of $150.00, of which $1.00 shall be transferred to the state general fund as a tax levy pursuant to section 2-5-119, C.R.S. All petitions or motions and all briefs and original proceedings shall be typewritten or reproduced by any duplicating or copying process which produces a clear black image on white paper, double spaced, and on good and durable paper, bound at the top. Petitions, motions and briefs not in conformity herewith shall not be accepted by the clerk except by order of the court. (Amended December 4, 1980, effective January 1, 1981; amended May 6, 1982, effective July 1, 1982; amended July 7, 1983, effective January 1, 1984; amended September 23, 1983, effective January 1, 1984.)

(c) Number of Copies to be Filed and Served. Ten copies of each petition, motion or brief or other paper shall be filed. (Amended and effective July 30, 1970.)

(d) Content of Pleadings and Service. In all original proceedings brought under this rule, the petition filed shall set forth the nature of the action or threatened action or the refusal to act by the court below or in the inferior

tribunal; the circumstances which render it necessary or proper that the Supreme Court exercise its original jurisdiction, and the type of relief sought; and the names and addresses of the parties and their attorneys, if any, in the district court action or in the proceeding in the inferior tribunal, concerning which relief is sought in the Supreme Court under this rule. When the action, threatened action or refusal to act is within the discretion of the district court, prohibition or mandamus shall not be a remedy, but the same may be a ground for appeal after final judgment.

In all original proceedings brought under this rule, where the Supreme Court shall have issued an order directed to the respondent to show cause why the relief prayed for in the petition should not be granted, the clerk of the Supreme Court shall serve a copy of the order to show cause by mail on the respondent district court and other respondents, and on all parties in the district court action or in the proceeding in the inferior tribunal, as set forth in the petition, concerning which relief is sought in the Supreme Court under this rule. (Amended and effective January 10, 1980.)

(e) Response; Opposition Briefs. The response to any order of the court and the opposition's brief supporting said response shall conform to section (b) of this Rule. (Effective January 1, 1970.)

(f) Petition for Rehearing. In all proceedings under this Rule, where the Supreme Court shall have issued an order directed to the respondent to show cause why the relief prayed for in the petition should not be granted, and where a decision shall have been rendered by the Court on the merits of the petition, a petition for rehearing may be filed in accordance with the provisions of C.A.R. 40. (Amended and effective February 18, 1972.)

No. 89-531

IN THE

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a MOUNTAIN BELL, a Colorado corporation,
Petitioner,

v.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO, and THE HONORABLE WILLIAM G. MEYER, one of the judges thereof,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

RESPONDENTS' BRIEF IN OPPOSITION

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COUNSEL FOR RESPONDENTS
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October 30, 1989

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

QUESTION PRESENTED

Does a trial court order requiring a class action defendant to send in its billing envelopes a constitutionally required judicial notice to potential class members, at no cost to the defendant, comport with *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986)?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents District Court, City and County of Denver, State of Colorado, and The Honorable William G. Meyer, one of the judges thereof ("the trial court"), respectfully request that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

In March 1982, petitioner Mountain States Telephone and Telegraph Co., d/b/a Mountain Bell ("Mountain Bell")[1] created a new competitive service for inside wire maintenance wholly apart from its regulated monopoly

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[1] Mountain Bell officially changed its operating name in June, 1987. Formerly known as Mountain Bell, it now does business under the name US West Communications.

services. Five years later, the named plaintiffs[2] filed this class action lawsuit alleging that Mountain Bell has unlawfully monopolized this market by utilizing a "negative option" or "silence as consent" contract scheme to collect monthly fees from its customers for inside wire maintenance services. Appendix to Petition for Writ of Certiorari at 2a-3a ("Pet. App."). Through this scheme, Mountain Bell immediately acquired a 98% market share and has received more than $50 million from Colorado customers since 1982. The lawsuit asserts violations of the Colorado Antitrust Act, the Colorado Consumer Protection Act, and Colorado law concerning contract formation, fraud and material misrepresentation by concealment or nondisclosure. *Id.* at 3a. No violations of federal law are asserted.[3] Mountain Bell's answer denies all liability, raises affirmative defenses and asserts a counterclaim. The plaintiffs deny the allegations of the counterclaim. *Id.* at 3a-4a.

The trial court certified the lawsuit as a class action, which could potentially involve 1.5 million customers of Mountain Bell. Once the trial court certified the class, Colo.R.Civ.P. 23(c)(2) required the court to "direct to the members of the class the best notice practicable under the circumstances," informing them of the existence of the lawsuit, the content of the claims and counterclaims, their options for participation or withdrawal, and their right to appear. Colo.R.Civ.P. 23(d) provided the trial court with

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[2] The real parties in interest are the named plaintiffs in the lawsuit pending before the respondent court. *See* Petition for Writ of Certiorari at ii. The named plaintiffs represent the class of plaintiffs which includes all persons and entities who have been customers of Mountain Bell in Colorado since the unbundling of inside wire maintenance service in 1982 and who have been charged fees for such service between that date and August 25, 1989. *See id.*

[3] Subsequently, a similar lawsuit was filed in the United States District Court for the District of New Mexico, alleging, *inter alia*, Mountain Bell's violation of federal antitrust law. *Sollenberger v. Mountain States Tel. and Tel. Co.*, No. 87-1485-SC (D.N.M.).

substantial discretion in the manner and method by which it satisfied this notice requirement. Under this rule, the trial court allocated the responsibilities for meeting the notice requirement as follows: (1) the trial court is responsible for the content of the class notice, which will be issued under its signature; (2) Mountain Bell will distribute the notice as a one-time enclosure in its monthly billing envelopes; and (3) the plaintiffs will bear the entire expense of notice production and distribution, including any costs incurred by Mountain Bell.

The dispute presently before the Court concerns the portion of the trial court's notice order which requires Mountain Bell to mail the class notice. This portion of the order was based upon the trial court's evaluation of the substantial delay, difficulty and expense that would result if the plaintiffs were required to duplicate Mountain Bell's computerized mailing records and facilities for the one-time mailing. *See* Pet. App. at 27a-31a. The task assigned to Mountain Bell, furthermore, does not differ in kind from the service it regularly provides to advertisers, who buy the "extra space" in the billing envelopes in order to reach Mountain Bell's customers. *See Sollenbarger v. Mountain States Tel. and Tel. Co.*, 121 F.R.D. 417, 437 (D.N.M. 1988).

Mountain Bell objected to the notice task assigned to it, asserting a first amendment right to be free of any association with the claims contained in the court's notice. It relied almost exclusively on *Pacific Gas & Elec. Co. v. Public Utilities Comm'n.*, 475 U.S. 1 (1986) ("*PG&E*"). The trial court ruled against Mountain Bell on the basis that the notice to potential class members does not come within the first amendment holding of *PG&E*. Pet. App. at 30a.

Mountain Bell sought interlocutory review by filing an original proceeding in the Colorado Supreme Court. That

Court also rejected Mountain Bell's first amendment claim, holding that the notice

> does no more than provide Mountain Bell customers with factually accurate information with respect to their right to join in or be excluded from pending litigation over inside wire maintenance service — a matter directly bearing on the commercial relationship between Mountain Bell and its customers — and is reasonably related to the substantial governmental interest of providing a fair and cost-effective method for resolving a multitude of claims involving common issues of fact or law in one lawsuit, thereby preventing the unnecessary waste of judicial resources in repetitious litigation.

Pet. App. at 17a.

REASONS FOR DENYING THE WRIT

The Colorado Supreme Court's decision is completely consistent with *PG&E* and does not conflict with the decision of any court. In the only other case involving the issues presented in the petition, the district court rejected Mountain Bell's argument as a misreading of *PG&E*. *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417 (D.N.M. 1988); Order denying Motion to Alter or Amend, reproduced in Respondents' Appendix A at A-1 to A-7 ("Resp. App.").[4] Moreover, the acceptance of Mountain Bell's argument would seriously impair the judicial process.

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[4] Mountain Bell has sought interlocutory review of the District Court order rejecting the same constitutional arguments put forth in the petition for writ of certiorari. The plaintiffs have moved to dismiss the interlocutory appeal for want of appellate jurisdiction and that motion is presently pending before the Court of Appeals for the Tenth Circuit.

I. THIS COURT HAS LONG RECOGNIZED TRIAL COURT AUTHORITY TO ASSIGN NOTICE TASKS TO DEFENDANTS IN CLASS ACTIONS.

The trial court's order assigning a legal notice task represents nothing more than a typical exercise of its discretionary authority in managing a Rule 23(b)(3) class action. Pursuant to Colo.R.Civ. 23(d), the trial court necessarily assessed the resources and abilities of the parties in assigning the tasks required to provide the notice mandated by Colo.R.Civ.P. 23(c)(2). The notice order requires the plaintiffs to bear all costs of production and distribution, and Mountain Bell, which has the requisite computerized mailing system and facilities in place, to distribute the notice as a one-time enclosure in its monthly billing envelopes.

State and federal trial courts routinely issue similar notice orders,[5] and this Court has specifically approved the practice. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 180 n.1 (1974) (Douglas, J., dissenting in part) the possibility of requiring a defendant to assist a trial court in disseminating its class notice was first discussed. Four years later, this Court unanimously approved the exercise of court discretion to require such action. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 n.22 (1978).

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[5] Several states, for example, explicitly authorize their trial courts to require that defendants send the notice to the plaintiff class. Penn.R.Civ.P. 1712(c) (1989); Oreg.R.Civ.P. 32F.(4) (1987); Calif. Civil Code § 1781(d) (1985). *See also* C.P.L.R. § 904(d)I (1978) (New York); Mich. Comp. L. § 445.911(5) (1989); Rules Governing the Courts of the State of New Jersey 4:32-2(b) (1989) (authorizing trial courts to require that defendants bear costs of notice to plaintiff class). Typical of federal court practice allowing enclosures are *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977), *cert denied*, 434 U.S. 1086 (1978); *Partain v. First Nat'l Bank of Montgomery*, 59 F.R.D. 56, 61 (M.D. Ala. 1973); *Zachary v. Chase Manhattan Bank*, 52 F.R.D. 532, 535 (S.D.N.Y. 1971); *Jacobs v. Sea-Land Serv.*, 23 F.E.P. Cas. 1179, 1182 N.D. Cal. 1980) (defendant employer attached notice form to paycheck envelopes) *See also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 n.22 (1978) (listing federal cases that contemplate similar procedure).

In *Oppenheimer*, the Court cited a number of district court decisions that had "required the defendants in Rule 23(b)(3) class actions to enclose notices in their own periodic mailings in order to reduce the expense of sending the notice." 437 U.S. at 355 n.22. Indeed, the order at issue in *Oppenheimer* had allowed "the notice to class members . . . to be inserted in the envelopes of a periodic . . . mailing" of the defendant. *Id.* at 346 n.7. Thus, the very practice at issue here was recognized as an appropriate exercise of district court discretion designed to accomplish the mandatory notice with "less difficulty or expense," *id.* at 356, than would otherwise be the case.

Mountain Bell argues that court authority regarding class notice was entirely changed by *PG&E*, which, despite its explicit exception for "legal notices," 475 U.S. at 15 n.12, effectively overruled this prior line of cases and rendered unconstitutional the well established state and federal court practice. *PG&E* did no such thing.

II. THE DECISION OF THE COLORADO SUPREME COURT IS CONSISTENT WITH PG&E.

PG&E involved a state regulatory commission order converting a utility's billing envelope into a public forum for political debate. The commission order required the utility to provide space in the envelope, free of charge and on a regular basis, to a third party with a political and ideological agenda opposed to that of the utility. *See PG&E*, 475 U.S. at 6. The commission made no effort to regulate the content of what was inserted in the envelope. It was enough that the message was from an opponent of the utility.

This Court struck down the order as a content-based burden on the utility's constitutionally protected freedom of expression. The commission had impermissibly chosen one speaker, based on the identity of its interests, and forced the speaker's opponent to bear the burden and cost of disseminating the speaker's message. *PG&E* was, therefore, a classic example of the state burdening one party's

speech in order to encourage and strengthen the speech of another. Such one-sided interventions in the private marketplace of public debate have long been held to be unconstitutional. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

Two potential consequences of the commission's order were of particular importance to the decision in *PG&E*. First, by granting access to the utility's opponents, the commission was burdening, and even penalizing, the utility's expression of opinion on noncommercial issues. This, the plurality reasoned, could easily result in a decision by the utility not to speak on controversial issues. *PG&E*, 475 U.S. at 14 (Opinion of Powell, J.). Second, because the utility was forced to associate with political or economic messages with which it disagreed, it might be compelled to alter the content of its own messages in response. The commission could not provide a private party such control over the speech agenda of another private party. *Id.* at 15-16 (Opinion of Powell, J.). *See also id.* at 23 n.2 (Marshall, J., concurring).

PG&E also established two specific exceptions to the general rule of utility control over the content of information mailed in its billing envelopes:

> The Commission's order is . . . readily distinguishable from orders requiring appellant to carry various legal notices . . . . The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations.

Id. at 15 n.12 (citation omitted); *see also id.* at 23 n.2 (Marshall, J., concurring). The trial court's class notice clearly comes within the "legal notice" and "appropriate information disclosure" exceptions recognized in *PG&E*.

A. The Trial Court's Class Notice Falls Within the Exceptions Recognized in PG&E.

1. The Legal Notice Exception

While Mountain Bell concedes that *PG&E* does not apply to legal notices, it argues that this exception is limited to legal notices to which a regulated utility has implicitly consented. *See* Pet. at 19-20. Consent, however, had nothing whatsoever to do with the holding in *PG&E*. The whole point of *PG&E*, as well as its predecessor, *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), was to make clear that a private corporation does not waive its first amendment rights simply by virtue of its status as a regulated entity. *See PG&E*, 475 U.S. at 17 n.14. Generally, the state may not condition acceptance of state benefits on a private party's consent to a waiver of its constitutional rights. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963); *Speiser v. Randall*, 357 U.S. 513, 519-20 (1958). This principle was extended to regulated utilities in *Consolidated Edison* and *PG&E*. Accordingly, the legal notice exception rests not on the utility's consent, but on the strength of the state's interests in providing notice of matters of public concern and on the minimum impact of such notices on the utility's own speech.

In this case, the substantial state interests concern both the substance of this litigation and the management of class action litigation. The plaintiffs allege that Mountain Bell has violated state laws designed to protect markets and consumers. Colorado has chosen to secure the enforcement of these laws through both public and private actions.[6]

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[6] With respect to the conduct at issue here, the Attorney General of Colorado filed, and subsequently settled, an action against petitioner. *State of Colorado v. Mountain States Co.*, Cause No. 87-CV-21225. The State Attorney General's action did not preclude this private litigation.

In addition to the substantive state interests at issue in this case, Colorado has a significant interest in the efficient management of its judicial resources through the class action procedure. As the Colorado Supreme Court recognized: "The basic purpose of a class action is to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit." Pet. App. at 9a; *see also id.* at 17a. This Court has also recognized these same governmental interests in allowing class actions, which "from the plaintiffs' point of view [resemble] a 'quasi-administrative proceeding, conducted by the judge.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (quoting 3B J. Moore & J. Kennedy, *Moore's Federal Practice* Para. 23.45[4.-5](1984)).[7]

Mountain Bell's facile attempt to distinguish legal notice of administrative proceedings from legal notice of court proceedings as the basis for circumventing the applicable exception set out in *PG&E* is both unsupportable and

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[7] Perhaps the best expression of the substantial state interest in the modern class action lawsuit was provided by Judge Weinstein, widely recognized as one of the nation's leading experts on civil procedure:

> The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.
>
> The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens — including those . . . consumers who overpay for products because of antitrust violations . . . or we are not . . . .
>
> When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy — or at least to deter — that conduct.

N.Y. Law Journal, May 2, 1972 at 4, col. 3 (quoted in *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 186 n.8 (opinion of Douglas, J.)).

untenable. Plainly, the state's interests in providing notice of class action litigation is at least as compelling as the state's interests in providing notice of regulatory matters.

2. The Business Disclosure Exception

In addition, the legal notice that Mountain Bell has been ordered to provide its customers can easily be understood as an "information disclosure requirement for [a] business corporation." *PG&E*, 475 U.S. at 15 n.12. The trial court's notice simply informs Mountain Bell's customers of the fact that a civil action has been filed against Mountain Bell and that the customers may want to take steps to protect their legal interests. The notice order is, in this sense, analogous to federal and state laws requiring corporations to disclose in a variety of business dealings the nature of lawsuits filed against them.[8]

Like the legal notice exception, the business information disclosure exception rests not only on the strength of the state's interests, but also on the relative weakness of the utility's interest in exclusion. The Colorado Supreme Court recognized this weakness when it stated that Mountain Bell's interests in the contents of the class notice "certainly can be no greater than the protection applicable to commercial speech." Pet. App. at 16a-17a. The Court reasoned that because a direct information disclosure requirement that attached to the underlying speech "involving a commercial transaction between the company and its customers," *id.*, would only have to meet a commercial speech

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[8] *See, e.g.*, 17 C.F.R. §§ 229.103, 240.14a-101 Item 14(b)(3)(C) (1987) (requiring corporations registering with SEC and soliciting proxies to describe pending legal proceedings, including the factual basis alleged to underlie the proceeding and the relief sought); C.R.S. § 11-51-109(2)(k)(1987) (requiring issuers to include in their registration statement "a description of any pending . . . proceeding to which the issuer is a party . . . ."); and § 303(b) Uniform Securities Act (incorporating this federal disclosure requirement for state offerings registered by coordination), adopted in 36 states and the District of Columbia.

standard, the notice required for adjudication of the legality of those transactions should not have to meet a higher standard.[9]

The effect of this conclusion was to distinguish this case, involving alleged violations of state laws designed to protect consumers and markets, from the sort of compelled speech involving either ideological affirmations, *see Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia Bd. of Educ. v Barnette*, 319 U.S. 624 (1943), or the political speech of newspapers, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and similar publications. *See PG&E*, 475 U.S. at 5 (describing monthly newsletter). In none of these cases could the state-compelled speech be considered, or even analogized to, a business information disclosure requirement. Mountain Bell implicitly admits that the interests affected by this information disclosure requirement rise no higher than commercial speech when it elaborates the importance of the billing envelope to the "corporation-consumer relationship." Pet. at 29.

B. The Trial Court's Notice Order Satisfies the Due Process Requirements of Rule 23(c)(2) and Does Not Implicate the First Amendment Issues Decided in PG&E.

Not only does the trial court's notice come within the specific exceptions set out in *PG&E*, but the controverted judicial order has nothing in common with the commission action in that case. The critical points of *PG&E* were as follows: (1) the State intervened in a public debate in order to force a utility to support the speech of another private party; (2) the reason for this intervention was to advance a State policy that favored the speech interests of the private

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[9] Contrary to Mountain Bell's allegation, Pet. at 14, the Colorado Supreme Court did not characterize the legal notice itself as "commercial speech." *See* Pet. App. at 16a-17a. It used the commercial speech analysis only to appraise the strength of Mountain Bell's interest in the activity underlying the lawsuit.

party over the speech interests of the utility; and (3) the effect of the intervention was likely to be an alteration in the noncommercial speech of the utility, which would seek to avoid such burdens in the future and would be forced to respond to the controversial messages it was compelled to convey. On each of these critical points, the first amendment interests recognized in *PG&E* are not implicated by the trial court's notice order.

1. The Class Notice Mountain Bell is Required to Convey is the Speech of the Trial Court, Not of the Plaintiffs.

Mountain Bell's argument is premised upon the fundamental mischaracterization of the notice at issue here as the speech of the plaintiffs, rather than that of the trial court. Pet. at 21. Colo.R.Civ.P. 23(c)(2) states: "the *court* shall direct to the members of the class the best notice practicable under the circumstances . . ." (emphasis added). Consistent with this language, both Colorado courts which reviewed the particular notice at issue here held it to be the official speech of the court, not the private speech of a party. Pet. App. at 18a, 30a.

Under the Colorado procedural rules, the plaintiffs in a class action have no more control of the substantive content of the notice than does the defendant. In this case, both parties were entitled to, and received, exactly the same opportunity to advise the trial court of their recommendations regarding the content of the class notice. The trial court's notice objectively describes the claims, defenses and counterclaims and it describes each party's response to the claims made against it. The notice primarily consists of a description of the trial court's class action ruling, the options open to potential class members, and the rights and obligations of class members. *See* Pet. App. at 36a-38a. All of these matters are strictly functions of Colorado law and judicial practice, wholly independent of the character of either party's allegations and responses.

The plaintiffs are no more free to convey a message of their own choosing to potential class members through this notice than is Mountain Bell. Although the trial court is utilizing Mountain Bell's billing envelopes to transmit its class notice, the plaintiffs are not independently communicating with potential class members in that notice.[10]

2. Colo.R.Civ.P. 23(c) Does Not Express a Preference for Particular Speakers, But Rather Fulfills a Constitutional Obligation.

Colorado's strict control over the content and form of the class notice underscores the legal significance of providing adequate notice to potential class members. As recognized by the Colorado Supreme Court, "[t]he mandatory notice provisions of C.R.C.P. 23(c)(2) are designed to fulfill due process requirements to which the class action procedure is subject." Pet. App. at 13a. The constitutional right of class members to this notice creates a duty for the state — not for the plaintiff. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. at 812.[11] Because the state intends to adjudicate property interests of absent class members, it must provide them the

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[10] Issues relating to a party's communciations with class members have arisen in the courts, *see, e.g., Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985), and this Court has considered the appropriatness, under the Federal Rules of Civil Procedure, of court-ordered restraints on that speech. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). The speech in these cases, however, differed dramatically from the legal notice at issue here because it was partisan advocacy of a party's position, unconstrained by prior judicial appraisal.

[11] *See also* 7B C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1786 at 189 (1986) ("Without the notice requirement it would be constitutionally impermissible to give the judgment binding effect against the absentee members of the class.") The parallel federal Rule 23(c) was "designed to fulfill requirements of due process to which the class action procedure is of course subject." Notes of Advisory Committee on the 1966 amendment to Rule 23, set out after Rule 23 in 28 U.S.C.A. (at 57).

best practicable notice. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-15 (1950).

The constitutionally mandated notice at issue here cannot be considered even remotely a part of a public debate about controversial, noncommercial issues. Unlike the regulatory commission in *PG&E*, the trial court has not joined a public debate, let alone intervened on behalf of one party to such a debate. Rather, it has acted to meet its constitutional obligations. While a lawsuit may become the subject of a public debate — generating press reports, news conferences and even private, direct-mail campaigns — the legal notice to class members is not itself an element of that debate.

What the parties may choose to say about a lawsuit is a matter wholly different from what the state is required to say whenever it adjudicates the claims of absent parties. The court order in this case, therefore, does not reflect any policy choice on the part of the state to intervene in the public debate that may arise as a result of the filing of this lawsuit and the allegations that the parties have made. The state has merely recognized, and responded to, the constitutional right of every potential class member to be informed of the pendency of this lawsuit.

3. The Trial Court's Notice Order Neither Penalizes Nor Burdens Mountain Bell's Past or Future Speech.

The Court's holding in *PG&E* did not depend simply on the formal characterization of the commission's intervention in a public debate, but also on the likely consequences to the utility of that intervention. The commission's order constituted a penalty and a burden on the utility's expression of opinions on controversial, noncommercial subjects.

The trial court's notice order cannot reasonably be viewed as "penalizing" Mountain Bell's speech. Mountain Bell could not have avoided the mandated class notice by altering its noncommercial speech. It cannot hope to avoid

similar orders that may arise in future litigation by remaining silent on controversial issues.

Finally, the trial court's order lacks all of the burdensome features identified in *PG&E*. There, the private party was granted free access to the billing envelopes and the utility would have to absorb the costs. Here, the plaintiffs will bear the applicable costs. There, because the commission was trying to shape a long-term debate, the private party was granted periodic access to the billing envelopes. Here, the court order involves only a single occasion of access to the billing envelopes. There, the private party was free to convey any message it chose, creating an indefinite threat or problem for the utility. Here, the court completely controls the content of the message.

In sum, the trial court's order is not a penalty for past or future expresssion of views on controversial subjects and it imposes no burden on Mountain Bell.

III. THERE-IS NO CONFLICT BETWEEN THE DECISION OF THE COLORADO SUPREME COURT AND THE DECISION OF ANY OTHER COURT.

The only other case addressing possible first amendment limitations on a trial court's authority to assign notice tasks to a class action defendant is *Sollenbarger*. There, the district court rejected Mountain Bell's interpretation of *PG&E* and required Mountain Bell to mail the court's notice to potential class members. Resp. App. at A-3 to A-7; *see Sollenbarger*, 121 F.R.D. at 436-37. Mountain Bell ignores this precedent and instead attempts to manufacture a conflict based on unrelated lower court decisions.

Mountain Bell contends that review is justified because of a conflict between the Colorado Supreme Court decision and *Central Illinois Light Co. v. Citizens Utility Bd.*, 827 F.2d 1169 (7th Cir. 1987). The Colorado Supreme Court properly understood *Central Illinois* to be a straightforward application of *PG&E*. Pet. App. at 21a n.6. Because Moun-

tain Bell's argument with respect to *PG&E* is unavailing. *Central Illinois* does not in any way strengthen its position.

Central Illinois involved a situation virtually identical to that in *PG&E*. Illinois had passed a statute that forced utilities to provide access to their billing envelopes to consumer groups. Just as in *PG&E*, the State forced the utility to provide access to third-party messages, based on the substantive character of the interests represented by the groups benefited. Also as in *PG&E*, access was to be provided at least four times a year and the utilities were to absorb the costs of the notice. While the Illinois statute seemed to limit the content of these messages to objectively neutral information, the court concluded that "[w]ithout exception, these enclosures have advocated positions contrary to those of the utilities." *Central Illinois*, 827 F.2d. at 1171 (citation omitted). Indeed, the court gave an example of one message that began as follows: "WARNING! This utility bill may be hazardous to your budget." *Id.* at n.2. Given these facts, the court correctly held the Illinois regulatory scheme to be "in all material respects, constitutionally indistinguishable" from the commission order struck down in *PG&E*. *Id.* at 1174.

Mountain Bell also suggests some general problem concerning the extent to which a court "can burden litigants' First Amendment rights in a class action proceeding." Pet. at 26. Except for the unsupported assertion that the trial court's order would have been rejected by the Fifth Circuit, under a standard that this Court specifically declined to consider, *see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15 (1981), Mountain Bell offers no other basis for review. The Fifth Circuit case upon which Mountain Bell relies involved a prior restraint of speech that was "both constitutionally protected and consistent with the purposes of the class action." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 475 (5th Cir. 1980). Instead of restraining constitutionally protected speech, the trial court here is speaking to satisfy a constitutional requirement.

In the only other cases Mountain Bell cites which are even vaguely related to this issue, the courts held that district courts do have the authority, under appropriate circumstances, to issue orders restricting a party's ability to communicate with potential class members. *See In re School Asbestos Litig.*, 842 F.2d 671 (3d Cir. 1988); *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985). Mountain Bell fails to identify any conflict or even any practical problem that would justify review of this case. This Court has already recognized that "in the conduct of a case, a court often finds it necessary to restrict the free expression of participants." *Gulf Oil*, 452 U.S. at 104 n.21.

IV. THE RULE FOR WHICH MOUNTAIN BELL ARGUES WOULD IMPAIR JUDICIAL CONTROL OF THE LITIGATION PROCESS.

Acceptance of Mountain Bell's argument would have damaging consequences for judicial management of litigation. Recognition of a first amendment right to remain silent in the litigation context would not only complicate notice requirements, it would extend a constitutional impediment to discovery and other aspects of litigation.

While Mountain Bell attacks only the constitutionality of the requirement that it share in the responsibility for the constitutionally mandated notice, its first amendment argument cannot be so easily cabined. For example, if Mountain Bell has a right not to associate with the notice of the plaintiffs' claims, then presumably the plaintiffs can claim the same right not to associate with the notice of Mountain Bell's answer, affirmative defenses and counterclaim. Mountain Bell could also raise a similar first amendment objection if the trial court required it to provide a list of its customers to the plaintiffs. Conceptually, this would be just another form of compelled speech for the benefit of a party's adversaries. Similarly, an unsuccessful class action defendant is often required to reimburse the named plaintiffs for the cost of the notice. *See* 3B J. Moore & J. Kennedy, *Moore's*

Federal Practice Para. 23.55 n.29 (1987). Because Mountain Bell's first amendment claim cannot depend upon the outcome of the lawsuit, Mountain Bell could object to any such order shifting costs as an unconstitutional, compelled subsidy of an ideological opponent. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-36 (1977).

Furthermore, the likely consequences of this novel first amendment argument cannot be limited to issues arising out of legal notice requirements. Discovery would become virtually impossible if parties could claim a right not to speak when that speech might aid an ideological, political or economic opponent. Instead of relying on traditional rules of privilege, parties to litigation — and even witnesses — could invoke a first amendment right not to speak. In each case, Mountain Bell would have the courts weigh the strength of the state's interests and its ability to accomplish the same ends in some other way that does not intrude upon these alleged first amendment interests before the court could compel a recalcitrant party to speak. The adoption of Mountain Bell's unprecedented argument would impair the entire judicial process.

CONCLUSION

The decision of the Colorado Supreme Court is fully consistent with this Court's decision in *PG&E* and it does not conflict with any lower court decision. Furthermore, Mountain Bell's argument would have untenable consequences for the conduct of litigation. Accordingly, the petition should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

ROGER SOLLENBARGER, RALEIGH K. GARDENHIRE, CHARLES WHEELER AND PETER NAUMBURG, for themselves and all others similarly situated, *Plaintiffs,* vs. MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a U.S. WEST, a Colorado corporation, *Defendant.*	CIVIL ACTION NO. 87-1485-SC

ORDER

This matter comes before the court on defendant's motion, pursuant to Fed. R. Civ. P. 59(e), to alter the class certification order entered on August 15, 1988. Defendant's timely motion challenges the court's decision to allow plaintiffs' to disseminate notice to the class via defendant's monthly billing statement. Class Certification Order at 48. The court based its decision on *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 348 and n.22 (1978). *Id.* Defendant's argue a subsequent decision of the U.S. Supreme Court, *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 106 S.Ct. 903 (1986), bars the procedure outlined by this court for class notice on first amendment

grounds. The court considered the memoranda submitted by the parties and is prepared to rule.

The court must first confront plaintiffs' contention that defendant waived their constitutional argument. Plaintiffs assert they briefed the notice question on two occasions; defendant did not respond; and therefore, defendant waived the issue. Defendant argues that 1) the court granted it a future hearing on the notice issue at the June class certification hearing and 2) the notice issue was not ripe until after the court certified a class action. This court has often stressed the importance of the constitutional rights of all persons and entities and has strictly construed any claim of a waiver of a constitutional argument. While defendant's reading of the class certification hearing and its ripeness argument are strained interpretations, the court will consider the motion on the merits.

Defendant relies on *Pacific Gas* for the general proposition that no arm of government can force it to disseminate information it disagrees with consistent with the First Amendment of the Constitution. In *Pacific Gas*, the Court struck down a California Public Utilities Commission order that required the utility to allow a consumer group to use the "extra space" in Pacific gas' monthly bills four times a year at no charge. The "extra space" was the unused postal weight within the basic postage rate that remained after the Utility included its normal monthly bill. The Utility used the extra space for many years to distribute a newsletter. 106 S.Ct. 905-06. The Commission considered the extra space the property of consumers and believed that inclusion of information from a citizens' group would further the public interest. *Id.* at 906.

The Supreme Court struck the Commission's regulation because it "impermissibly burdens appellant's [Pacific Gas's] First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints." *Id.* at 914. A plurality of the Court first relied on several

forced association decisions. The Court invalidated rules in two cases which forced a party to associate with the views of another party with whom it did not agree. *Id.* at 908-09 (citing *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 214 (1974) (political candidate's statutory right to reply to a negative editorial or article in newspaper) and *Wooley v. Maynard*, 430 U.S. 705 (1977) (first amendment allows car owner to cover slogan on license plate that he does not want to associate with).

Second, the plurality overturned the Commission's order because it favored those who opposed Pacific Gas at rate hearings. When the Commission determined who could use the extra space in the monthly billings, it excluded groups who favored Pacific Gas from consideration for forced access to the monthly bills. *Id.* at 910-11. While Pacific Gas could not isolate itself from a public debate about rates, the Court held "it *does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Id* at 911 (emphasis in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 and n.56 (1976)). After determining Pacific Gas' speech was impermissibly burdened by the Commission's order, the Court concluded the order was not a narrowly tailored means to further a compelling state interest, and it was not a valid time, place or manner regulation. *Id.* at 915-16.

Justice Marshall concurred in the *Pacific Gas* judgment based on two relevant distinctions of a prior case, *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980). *Id.* at 914, 915-16. *PruneYard* held that a shopping center owner could not use state trespass laws to stop a group from requesting shoppers to sign a political petition. 447 U.S. at 86-88. First, Marshall distinguished *PruneYard* on the degree of access historically available in the shopping center and in Pacific Gas' monthly bills:

> Were appellant [Pacific Gas] to use its billing envelope as a sort of community billboard, regularly carrying the messages of third parties, its

> desire to exclude a particular speaker would be deserving of lesser solicitude. As matters stand, however, appellant has issued no invitation to the general public to use its billing envelope, for speech or for any other purpose.

106 S.Ct. at 915. The second distinction noted by Marshall was the effect on the defendants' rights to express their own views. While the defendants in both cases did not want to associate with contrary views, they had different expressive interests. In *Pacific Gas*, the utility could not use its typical forum four times each year, while in *PruneYard*, the shopping center owner did not allege any inhibition of his speech. *Id.* at 916.

Defendant argues that *Pacific Gas* undercuts this court's reliance on *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340 (1980). Class Certification Order at 48. The *Oppenheimer* decision explained when a district court could order a defendant to identify class members for notice purposes and when a defendant had to pay for a portion of the class notice process. *Id.* 355-56. In a discussion of district courts' powers under Fed. R. Civ. P. 23(d) to order defendants "to perform tasks other than identification that are necessary to sending class notice," the Court stated in a footnote:

> (A) number of courts have required defendants in Rule 23(b)(3) class actions to enclose class notices in their own periodic mailings to class members in order to reduce the expense of sending the notice, as respondents asked the District Court in this case to do.

Id. at 355 and n.22. This court relied on footnote 22 in drafting the pertinent part of the class certification order. Defendant contends this footnote is inapplicable after *Pacific Gas*. This court cannot concur.

First, the *Pacific Gas* plurality ruled that legal notices did not burden the speech of the utility. "The Commission's order is thus readily distinguishable from orders requiring

appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated." *Pacific Gas*, 106 S.Ct. at 911, n.12. A legal notice, such as a class action notice, does not implicate the concerns raised by the California order at issue in *Pacific Gas*. A class notice is generally made only once; the Commission order gave the consumer group four times each year to air its views. The order prevented the utility from expressing its views on any topic in the four monthly bills when the consumer group had access; the class notice in this case will have no restriction on defendant's right to speak. Defendant can use other parts of the unused portion of the monthly bill to comment on the suit, if they desire.

Second, the two distinctions Justice Marshall found distinguished *Pacific Gas* from *PruneYard* demonstrate that this situation is more like *PruneYard* and thus constitutional. Marshall was first concerned with the past opportunities third parties had to use the subject area for speech. 106 S.Ct. at 913. Unlike the utility in *Pacific Gas*, defendant sells space to as many as five persons each month. Class Certification Hearing at 86. As Marshall noted, a business publication which regularly carries messages of third parties deserves less solicitude when reviewing its claim to be free from forced association with certain views. *Id.*

Marshall's other concern was with any infringement on the rights of the owner of the forum to speak. In *Pacific Gas*, the utility could not speak four times per year when it historically would have; the shopping center owner in *PruneYard* merely did not want to associate with certain speech. *Id.* at 916. Defendant here is more like the shopping center owner; it has not alleged and could not that the class notice will prevent it from placing an insert in its bills concerning inside wire maintenance plans. The sole concern expressed in defendant's briefs is its desire to be free of any association with this suit. While the court understands defendant's perceived harm, this concern does not create a

constitutional impediment to sending class notice via defendant's monthly bills.

Plaintiffs moved the court in their response brief for sanctions against defendant, pursuant to 28 U.S.C. § 1927. Sanctions are appropriate under § 1927 when an attorney "multiplies the proceedings in any case unreasonably and vexatiously." *Id.* The Tenth Circuit recently stated sanctions were appropriate under § 1927 "for conduct, that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Brailey v. Campbell,* 832 F.2d 1504, 1512 (10th Cir. 1987). The court does not believe defendant's counsel breached this standard. If defendant had raised its constitutional argument when plaintiffs discussed the class notice issue, this case may have proceeded a bit further. This is doubtful, however, because the substance of the class notice is still under review by counsel. Second, defendant's argument that class notice issues are not ripe until a class is certified has some force. Thus, while defendant's counsel may not have conducted the litigation in the most expeditious manner, their conduct did not violate 28 U.S.C. § 1927.

IT IS BY THE COURT THEREFORE ORDERED that defendant's motion for reconsideration is denied. IT IS FURTHER ORDERED that plaintiffs' motion for sanctions is denied.

At Wichita, Kansas, this 7th day of October, 1988.

/s/ FRANK G. THEIS
United States District Judge

No. 89-531

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., d/b/a MOUNTAIN BELL, a Colorado corporation,
Petitioner,

v.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO, and THE HONORABLE WILLIAM G. MEYER, One of the judges thereof,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

MOTION FOR LEAVE TO FILE BRIEF FOR CHEVRON CORPORATION AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

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MOTION FOR LEAVE TO FILE BRIEF FOR CHEVRON CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36 of this Court, Chevron Corporation requests leave to file the accompanying brief as *amicus curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this brief, but counsel for respondents has refused consent.

The issue raised by the Petition for Certiorari is whether a court may compel a defendant to use its

monthly billing envelopes to disseminate a class notice to its customers, solely for the purpose of reducing the plaintiffs' cost of giving notice. In *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986) (*"PG&E"*), this Court upheld a company's right under the First Amendment to control its communications with its customers by refusing to use its billing envelopes to disseminate the views of third parties. The Colorado Supreme Court's decision that petitioner Mountain Bell nevertheless has no right to refuse to include a class notice in its billing envelopes represents a significant departure from this Court's decisions.

Chevron operates a large credit card network, mailing statements and other information to more than four million customers throughout the nation each month. Chevron's monthly mailings are frequently its only source of direct communication with its customers. For that reason, Chevron carefully selects the information included in its billing envelopes in order to ensure that it promotes or at least does not detract from the relationship Chevron has attempted to build with its customers.

If allowed to stand, the decision below would significantly diminish Chevron's and every other business' First Amendment right to communicate freely with its customers. Forcing a company to carry its opponent's message constitutes a serious invasion of its right to choose what it will and will not say to its customers. That is true whether the opponent's message is a political statement, as it was in *PG&E*, or whether it is a set of allegations put forth in ongoing litigation, as in the case at bar. In addition, the threat of such forced communications is likely to have a chilling effect on future communication, as businesses consider whether to communicate with their customers on a broad variety of matters as they have traditionally done, or whether to minimize their communications in order to eliminate the kind of "extra space" in their billing envelopes that plaintiffs seek to take advantage of here.

The issues presented in the petition concern all businesses that communicate on a regular basis with their customers. For that reason, Chevron urges the Court to grant its motion for leave to file the accompanying brief as *amicus curiae* in support of petitioner.

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Dated: October 30, 1989

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OCTOBER TERM, 1989

No. 89-531

MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO.,
d/b/a MOUNTAIN BELL, a Colorado corporation,
Petitioner,

v.

DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO, and
THE HONORABLE WILLIAM G. MEYER,
One of the judges thereof,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

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BRIEF FOR CHEVRON CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Chevron operates a large credit card network, mailing statements and other information to more than four million customers throughout the nation each month. As described in the accompanying motion for leave to file this *amicus* brief, the decision of the Colorado Supreme Court threatens the First Amendment rights of Chevron and many other businesses to communicate freely with their customers through the use of their own billing systems.

ARGUMENT

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *PACIFIC GAS AND ELECTRIC* BECAUSE IT FAILS TO RECOGNIZE THE BURDEN IMPOSED ON PETITIONER BY THE FORCED DISSEMINATION OF ITS OPPONENTS' MESSAGE THROUGH PETITIONER'S BILLING SYSTEM.

This is a class action in which petitioner Mountain States Telephone and Telegraph Company ("Mountain Bell") is accused of violating Colorado antitrust laws. The complaint also seeks to void certain contracts Mountain Bell entered into with its customers on grounds of fraud, breach of contract and claimed violations of the Colorado deceptive trade practices law. In accordance with the Colorado class action rule, which is identical to Rule 23 of the Federal Rules of Civil Procedure, the trial court ordered notice to be sent to potential class members before any decision had been made on the merits of plaintiffs' claims. Plaintiffs are apparently ready, willing and able to pay the $500,000 it would cost for them to mail notices to the class. Nevertheless, the trial court ordered Mountain Bell to include the class notice in one of its monthly billing statements, in order to reduce the cost of giving notice to approximately $300,000. Petn. at 9.

The notice approved by the trial court recites plaintiffs' allegations of misconduct, stating that Mountain Bell is accused, among other things, of engaging in fraud and deceptive practices. As is customary in such notices, Mountain Bell's general denial of these allegations is stated, without explanation. Petn. at 35a.

Mountain Bell objected to being compelled to include the class notice in its customer mailings. Mountain Bell argued in the courts below that such an order would force it to carry its opponents' message in violation of its First Amendment rights. The Colorado Supreme Court rejected these arguments, holding that there was no burden on

Mountain Bell's First Amendment rights and that the trial court's order was justified by the state's interest in the cost-effective management of class cases.

As demonstrated below, the Colorado Supreme Court was wrong on both counts. Forcing Mountain Bell to include class notices in its billing envelopes does impose significant burdens on its exercise of First Amendment rights. In addition, there is no important, let alone compelling, public interest that justifies the imposition of that burden.

A. Petitioner's First Amendment Rights Were Impermissibly Burdened By The Court's Order.

The Colorado Supreme Court recognized that in *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986) ("*PG&E*"), this Court held that a corporation could not be compelled to use its billing system to deliver a third party's message to its customers. The Colorado court also recognized that forced association with another person's opinions imposes a significant burden on First Amendment rights. Petn. at 17a-18a. The court distinguished *PG&E*, however, on the ground that the class notice Mountain Bell would be required to put in its billing envelopes reported the fact of plaintiffs' allegations in a neutral manner, without suggesting that Mountain Bell had admitted any misconduct. The court held that under these circumstances there was no forced association with the plaintiffs' views and no burden on Mountain Bell's First Amendment rights.

There are two difficulties with the Colorado Supreme Court's reasoning. First, the fact that the notice describes plaintiffs' claims of misconduct as "allegations" does not make those claims any less hostile to Mountain Bell. This Court has held on a number of occasions that the state may not compel a person to use his own property to convey a message with which he disagrees. That is true even if the recipient of the message is likely to understand that

it represents the opinions of a person other than the property owner.[1]

Second, the Colorado Supreme Court's reasoning completely ignores the very real risk of misunderstanding created by the use of Mountain Bell's billing envelopes to convey the class notice. A customer opening a bill would ordinarily assume that every piece of paper contained in the envelope was approved and endorsed by the company sending the bill. When a customer reads in a notice sent by the company that it has been accused of fraud and deceptive practices, that accusation is likely to gain credibility because of its perceived source. That is particularly true where the notice simply states that the company has generally denied the allegations of wrongdoing, without elaborating on the company's position. A reader briefly glancing through his mail, who does not understand the intricacies of class notice procedures, might well conclude that a company that notifies its customers that it has been accused of fraud but does not explain its side of the story must be guilty as charged.

The forced use of Mountain Bell's property to disseminate the plaintiffs' accusations of misconduct thus inevitably puts pressure on Mountain Bell to speak in order to counter those accusations. As Justice Powell noted in his

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[1] Mountain Bell is in the same position as the motorists in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), who were forced to use their automobiles to carry the state's message, and the newspaper in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), which was forced to provide a forum for opposing views. In both of those cases and in *PG&E* as well, it could be argued that no one reasonably believed that the speech in question was endorsed by the person whose property was being used to convey it. Indeed, in *PG&E*, the insert was specifically required to carry a disclaimer stating that it did not represent the views of the utility. See 475 U.S. at 15 n.11. Nevertheless, this Court held that the forced utilization of property to carry a message with which the owner disagreed was an impermissible burden on the owner's First Amendment rights.

opinion for the plurality in *PG&E*, pressuring a corporation to speak on a particular issue burdens its First Amendment rights just as surely as would prohibiting it from speaking. 475 U.S. at 15-16. Indeed, the dilemma created by the mailing of the class notice in Mountain Bell's own envelopes would arguably be worse than the difficulty encountered by the utility in *PG&E*. When it was forced to send out statements by its political opponents, the utility in *PG&E* at least had the option of using its own mailings to respond to those statements. Mountain Bell, however, might well be prohibited from communicating with class members about its opponents' litigation position except through court-approved notices. See *Kleiner* v. *First National Bank*, 751 F.2d 193 (11th Cir. 1985) (upholding sanctions against defendants' attorneys who solicited opt-outs from potential class members).

As Mountain Bell points out in its petition, the Colorado Supreme Court's decision conflicts not only with *PG&E*, but also with the Seventh Circuit's decision in *Central Illinois Light Co.* v. *Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987). In that case, the Seventh Circuit held that a utility could not be forced to include in its billing envelopes information soliciting memberships on behalf of its political opponents—even if the solicitation was done in a completely neutral manner. So too in this case, Mountain Bell should not be forced to use its billing envelopes as a vehicle for its opponents' solicitation of support for a class action.[2]

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[2] In addition to the short-term burdens imposed on Mountain Bell's First Amendment rights, the Colorado Supreme Court's decision may also have broad chilling effects on other businesses. If using a billing system that creates "empty space" puts a company at risk of being forced to carry someone else's message, it might well decide to choose a different system. A system that eliminated the empty space, however, such as the use of postcards or one-piece mailers, would require the company to sacrifice its own ability to communicate with its customers on matters of general and commercial concern.

B. There Is No Public Interest That Justifies The Burden Imposed On Petitioner's First Amendment Rights.

In order to justify a burden on First Amendment rights, the state must ordinarily demonstrate that it is necessary to serve a compelling state interest. *PG&E*, 475 U.S. at 19. In this case, the Colorado Supreme Court reduced the level of scrutiny applied by characterizing the whole matter as involving commercial speech. As Mountain Bell points out in its petition, the fact that the litigation involves the commercial relationship between Mountain Bell and its customers does not transform any statement concerning that litigation into commercial speech. Petn. at 14-17. Furthermore, as Mountain Bell also points out, even if the class notice could be considered commercial speech, that hardly permits the application of a relaxed standard of scrutiny. Forced access to Mountain Bell's billing envelopes cannot be justified on the ground that *plaintiffs* wish to engage in commercial speech. Petn. at 15. Indeed, characterizing the notice as a form of commercial speech should have led the Colorado Supreme Court in exactly the opposite direction, since there is by definition no public interest in promoting the commercial interests of any particular individual or group.

Whatever level of scrutiny is applied, however, there is no state interest that justifies burdening Mountain Bell's First Amendment rights by compelling it to mail class notices in its billing envelopes. The Colorado Supreme Court focused on the state's interest in ensuring efficient litigation of numerous small claims through the use of class actions. Although the state clearly has such an interest, it is simply not at issue here.

There has never been any suggestion that the plaintiffs in this case would be unable to continue with the action if they were not permitted to use Mountain Bell's billing envelopes to give notice to the class. Plaintiffs are apparently ready, willing, and able to finance the cost of a separate notice. The issue is thus whether

plaintiffs (or their attorneys) can avoid advancing an extra $200,000 to defray the cost of that notice. As Mountain Bell points out, the state has no interest at all in saving financing costs for a group of private plaintiffs, let alone the kind of interest that would justify the imposition of significant burdens on First Amendment rights.[3]

The Colorado Supreme Court's reliance on the state's interest in promoting efficient use of class actions is ironic, to say the least, in light of that court's adoption of the rule set forth in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), that plaintiffs must advance the costs of providing notice. If the state's interest in promoting class actions is not strong enough to require a defendant to advance the cost of giving notice, how can it be strong enough to justify burdening the defendant's First Amendment rights? That is particularly true where the imposition of the burden on First Amendment rights is entirely fortuitous, depending on the existence of "extra space" in the defendant's billing envelopes and a reasonably close match between the certified class and the defendant's current customers.

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[3] The cost of notice will ultimately be borne by the losing party or will be paid for out of settlement funds if the case is settled. The only cost that cannot be shifted, no matter how the case is ultimately disposed of, is the reputational damage that Mountain Bell will suffer if it is forced to include the class notice in its mailings to customers.

CONCLUSION

The Colorado Supreme Court's decision to reduce the plaintiffs' cost of giving notice by requiring Mountain Bell to include the class notice in its monthly billing statements is at odds with decisions by this Court and the Seventh Circuit prohibiting forced access to private billing systems. In light of this conflict and the importance of the issue to businesses throughout the country, Chevron urges the Court to grant the petition and reverse the decision below.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF EDISON ELECTRIC INSTITUTE, PACIFIC TELESIS GROUP, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND VISA U.S.A. INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In accordance with this Court's Rule 36, Edison Electric Institute, Pacific Telesis Group, American Bankers Association, American Financial Services Association, and Visa U.S.A. Inc. have sought the written consent of the

parties to file a brief as *amici curiae* in support of the petition of Mountain States Telephone and Telegraph Co. ("Mountain Bell" or the "Company") for a writ of *certiorari*. Mountain Bell has provided its written consent, which has been lodged with the Clerk, but counsel for the class action plaintiffs have withheld their consent.

The *amici curiae* and their subsidiaries and member institutions are engaged throughout the United States in the electrical power, telecommunications, and financial services industries. Every month, these companies mail bills, statements, and other correspondence to millions of customers nationwide. They have a strong interest in protecting their First Amendment right to control the contents of their periodic mailings, and thus they have a strong interest in the outcome of this case.

The *amici curiae* believe that they are in a position to assist the Court in assessing the deleterious implications of the Colorado Supreme Court's opinion. That opinion, which upheld the order of the United States District Court for the City and County of Denver, Colorado, would require Mountain Bell to mail to all of its customers in Colorado, as an insert in its monthly billing envelopes, a notice of a class action lawsuit brought against the Company. That notice repeats the representative plaintiffs' unsubstantiated allegations of wrongdoing on the part of Mountain Bell. If this Court does not issue a writ of *certiorari* and reverse the opinion of the Colorado Supreme Court, businesses such as those represented by the *amici curiae* may be forced to disseminate equally unsubstantiated and antagonistic allegations made in other class action lawsuits brought against them, in violation of their fundamental First Amendment rights. In that event, the potential customer confusion and loss of goodwill would be enormous.

In short, the Colorado Supreme Court's opinion could have significant nationwide repercussions, as set forth more fully in the accompanying brief of the *amici curiae*.

WHEREFORE, the *amici curiae* respectfully request that the Court grant their motion for leave to file the accompanying brief in support of Mountain Bell's petition for a writ of *certiorari*.

Respectfully submitted,

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BRIEF OF EDISON ELECTRIC INSTITUTE, PACIFIC TELESIS GROUP, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND VISA U.S.A. INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In accordance with this Court's Rule 36, Edison Electric Institute ("EEI"), Pacific Telesis Group, American Bankers Association, American Financial Services Asso-

ciation ("AFSA"), and VISA U.S.A. Inc. have filed the foregoing motion for leave to file this brief as *amici curiae* in support of Petitioner Mountain States Telephone and Telegraph Co. ("Mountain Bell" or the "Company"). The *amici curiae* requested the written consent of the parties to file this brief, but only Mountain Bell provided such consent, which has been lodged with the Clerk. Counsel for the class action plaintiffs withheld their consent. Having filed their motion, the *amici curiae* now respectfully submit this brief.

INTRODUCTION

In this case, Mountain Bell has been ordered by the District Court for the City and County of Denver, Colorado (the "District Court") to mail to all of its customers in Colorado, as an insert in its monthly billing envelopes, a notice of a class action lawsuit brought against the Company. The notice repeats the plaintiffs' allegations (1) that Mountain Bell "acquired and maintains a monopoly over the market for inside wire maintenance and repair services contrary to Colorado antitrust law" and (2) that the Company's inside wire maintenance contracts "are void or voidable because of fraud practiced by [the Company] and under principals [sic] of contract law and Colorado deceptive practices law." Petition of Mountain Bell for Writ of Certiorari to the Supreme Court of Colorado ("Petition") at 35a. The notice also states that Mountain Bell has denied these claims and charges.

The Company sought review of the District Court's order in the Colorado Supreme Court on the grounds that the order violates its First Amendment rights. The Colorado Supreme Court upheld the District Court's order in an opinion entered on July 24, 1989, and Mountain Bell now petitions this Court for a writ of *certiorari*. The *amici curiae* vigorously support Mountain Bell's petition.

INTEREST OF *AMICI CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve approximately 96 percent of all customers of the investor-owned segment of the electric utility industry and 74 percent of the nation's electricity users. EEI members mail approximately 79 million monthly billing envelopes to their customers nationwide.

Pacific Telesis Group is the California-based holding company formed as a result of the Bell System divestiture. Pacific Telesis Group has two Bell Operating Company subsidiaries—Pacific Bell and Nevada Bell—and several diversified subsidiaries, including cellular, paging, business telecommunications systems, and real estate operations. Pacific Bell and Nevada Bell are public utility companies providing telecommunications services to a majority of the people in the states of California and Nevada. Pacific Bell sends out approximately 14 million monthly billing envelopes to its customers in California. PacTel Cellular and the partnerships in which it participates provide cellular telephone service to hundreds of thousands of customers in California, Nevada, and several other states. In addition, PacTel Paging provides radio-paging service to over 300,000 subscribers spread across several states. Each of these businesses bills its customers for monthly service.

The American Bankers Association is the largest national trade association of the commercial banking industry in the United States. It has as members commercial banks in each of the fifty states and the District of Columbia, and those members hold approximately 95 percent of domestic assets of all United States commercial banks. Among other things, commercial banks make regular mailings to customers of credit card bills, checking account statements, Internal Revenue Service forms, dividend checks, and proxy statements.

AFSA is the nation's largest trade association representing nonbank providers of consumer financial services. Organized in 1916, AFSA represents 572 companies engaged in the extension of consumer credit throughout the United States. These companies range from independently-owned consumer finance offices to the nation's largest financial services, retail, and automobile companies. Consumer finance companies hold over $143 billion of consumer credit outstanding and over $38 billion in second mortgage credit, representing one quarter of all consumer credit outstanding in the United States. AFSA members include some of the largest bank and retail credit card issuers in the United States. These companies alone mail more than 70 million monthly billing statements.

Visa U.S.A. Inc. is a membership corporation consisting of over 19,163 United States financial institutions that participate in the Visa card program. Visa U.S.A. members have issued approximately 120,000,000 cards in the United States. In order to handle those accounts properly, Visa members typically and primarily rely on the mailing of periodic statements to their cardholders, generally on a monthly basis.

The periodic mailings made by the *amici curiae* and their members constitute the primary channel of communications between those companies and their customers. The companies carefully plan the contents of their mailings to promote readability and avoid potential customer confusion, to advise customers of important business developments, to solicit customer comments about their services, and generally to maintain good customer relations. For these reasons, any judicial decisions or regulatory orders that dictate, restrict, or augment the contents of those mailings affect the companies' fundamental First Amendment rights. Thus, the *amici curiae* have a strong interest in the outcome of this case.

Indeed, as numerous cases in recent years demonstrate, there have been increasing efforts on the part of third parties to gain access to business company mailings in order to promote their own social, political, and economic agendas. In *Pacific Gas and Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), this Court turned back those efforts and upheld a company's First Amendment right to decide what to include and what not to include in its monthly billing envelopes.

Unless this Court issues a writ of *certiorari* in this case and reverses the decision of the Colorado Supreme Court, the District Court's order will seriously undermine the protections afforded by *Pacific Gas and Electric* to companies such as the subsidiaries and member institutions of the *amici curiae*. That is because each such company will be required to disseminate to its customers, in the same envelope and with the same apparent dignity as its own regular correspondence, the unsubstantiated allegations of every class action plaintiff with an axe to grind against it. Such antagonistic bill inserts would poison and disrupt the very customer relationships that each company seeks to nurture by means of its periodic mailings.

This Court's prior decisions leave no doubt that forced association with the hostile views of others is unconstitutional under the First Amendment. In the case of class action notices, the hostile views of the plaintiffs are not mitigated by an acknowledgment in the notice that the defendant has denied the allegations. Furthermore, if defendants in class action lawsuits can be required to disseminate the views of class action plaintiffs at the outset of litigation, they can also be required to do so at every subsequent stage in the proceedings where notice to class members is deemed appropriate. The *amici curiae* maintain that the compelled disclosure by defendants of class action plaintiffs' views at *any* stage in the litigation is a

violation of the First Amendment, as it has been applied by this Court.

In short, the *amici curiae* and their members are firmly convinced that the Colorado Supreme Court erred as a matter of law in rejecting Mountain Bell's First Amendment challenge to the District Court's order. They are even more firmly convinced that the Colorado Supreme Court's opinion, if not reviewed and reversed by this Court, will adversely affect each company's ability to protect its business reputation by one of the primary means through which it establishes and safeguards that reputation, its periodic correspondence with its customers.

STATEMENT OF THE CASE

The *amici curiae* adopt Mountain Bell's Statement of the Case.

REASONS FOR GRANTING THE WRIT

For the reasons discussed below, the District Court's order at issue in this case, requiring a company to include in its periodic correspondence with its customers a notice of a class action lawsuit against it, raises a subject of national importance which this Court should review. The decisions of the District Court and the Colorado Supreme Court conflict with this Court's decision in *Pacific Gas and Electric* and the more recent decision of the United States Court of Appeals for the Seventh Circuit in *Central Illinois Light Co. v. Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987).

THE DISTRICT COURT'S ORDER, UPHELD BY THE COLORADO SUPREME COURT, STANDS TO HARM ALL BUSINESSES THAT ARE FORCED TO DISTRIBUTE NOTICES OF CLASS ACTION LAWSUITS BROUGHT AGAINST THEM.

At issue in this case is the First Amendment right of a business corporation to freedom of speech. This Court has recognized that "[f]or corporations as for individuals,

the choice to speak includes within it the choice of what not to say." *Pacific Gas and Electric*, 475 U.S. at 16, *citing Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248 (1974). In its judgment entered on July 24, 1989, the Colorado Supreme Court found that Mountain Bell's right to free speech was not violated by the District Court's order requiring the Company to distribute the class action notice over its objections. The Colorado Supreme Court's decision, however, rests upon a mischaracterization of the nature and content of that notice and upon a misunderstanding of its effect when distributed in Mountain Bell's own business correspondence.

A. A Class Action Notice Is Not "Objectively Neutral."

The Colorado Supreme Court acknowledges that "under some circumstances controlled access to a company's billing envelopes for purposes of transmitting a message antagonistic to the interests of the company might impermissibly abridge the First Amendment rights of the company." Petition at 17a. It denies that notice of a class action lawsuit is such a message, because "[t]he notice involved here is a message from the court, calculated to inform Mountain Bell customers of the nature of the pending litigation in which the customers might have some interest." *Id.* at 18a. The Colorado Supreme Court's characterization of the class action notice is disingenuous.

Although a class action notice may "emanate" from the court, *id.* at 21a, it is typically drafted by the plaintiffs and merely approved by the court before mailing. Further, the notice does not just provide potential class members "with factually accurate information with respect to their right to join in or be excluded" from the pending litigation. *Id.* at 17a. To the contrary, it reiterates the plaintiffs' unsubstantiated allegations of wrongdoing by the defendant, no matter how farfetched or scurrilous. Such allegations cannot in themselves be considered "objectively neutral information," *id.* at 18a,

and they are not rendered neutral by the subsequent recitation in the notice that the defendant has denied them. The allegations remain "antagonistic to the interests of the company," *id.* at 17a, and forced distribution of the notice does indeed abridge the defendant's First Amendment rights.

In *Central Illinois Light Co.*, the Seventh Circuit prohibited, as a violation of the First Amendment, a statutorily-created Citizens Utility Board from soliciting members and membership dues through envelope enclosures mailed by utilities along with their regular billings. The Board argued that it could limit the content of its enclosures to objective, informational, neutral speech. 827 F.2d at 1172-73. The court rejected that argument, in part on the ground that "the purpose, nature and activities of [the Board] necessarily produce speech that disagrees" with the utilities' views. *Id.* at 1173. The same can be said of class action plaintiffs: their speech, even tailored to fit a notice to potential class members, necessarily disagrees with the defendant's views.

Thus, a class action notice, drafted by the plaintiffs and repeating the allegations of the class action complaint, more nearly resembles "the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views," *Pacific Gas and Electric*, 475 U.S. at 15 n.12, than "legal notices, such as notices of upcoming [Public Utility] Commission proceedings or of changes in the way rates are calculated." *Id.* As this Court has noted, the State may require utility companies to publish those kinds of legal notices, which are merely incidental to public utility regulation, but not the partisan messages of third parties. *Id.* The Colorado Supreme Court has failed to perceive the bias inherent in a class action notice and would require Mountain Bell to distribute it, contrary to the distinction drawn in *Pacific Gas and Electric.*

B. When Distributed By The Defendant, A Class Action Notice Is Not Subjectively Neutral.

Consistent with its mischaracterization of a class action notice drafted by the plaintiffs as a "message from the court," the Colorado Supreme Court belittles the possibility that "a customer would somehow construe the notice as an endorsement by Mountain Bell of the class action or a concession on its part that the pending lawsuit has merit." Petition at 18a. Similarly, it denies that the forced inclusion of the notice in Mountain Bell's monthly billing envelopes would place the Company "in the position of associating with the allegations of the complaint or with any message with which it disagrees" or "being compelled to respond to a message where it might otherwise have preferred to remain silent." *Id.* (footnote omitted). The Colorado Supreme Court's position is at odds with common sense and experience.

As Justice Holmes acknowledged long ago, in First Amendment matters "the character of every act depends upon the circumstances in which it is done." *Schenck v. United States*, 249 U.S. 47, 52 (1919); *see also Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980) (of particular importance is "the medium by which the statement is disseminated and the audience to which it is published"). Thus, common sense leads to the conclusion that the First Amendment right to free speech would not protect a man in falsely shouting "fire" in a crowded theatre and causing a panic. *See Schenck*, 249 U.S. at 52. In this case, common sense suggests that requiring a company to send a class action notice drafted by the plaintiffs along with the company's regular billing correspondence would give such notice a dignity it would not have if it were mailed by the plaintiffs under separate cover. Even if customers do not mistake the notice for a concession by the company as to the merits of the lawsuit, they may be more inclined to accept the plaintiffs' allegations as true when they see

that the company itself has sent them the notice. At a minimum, the inclusion of a class action notice in a company's periodic correspondence with its customers can only derogate from the company's efforts to create and protect its goodwill.

In *Pacific Gas and Electric*, this Court held unconstitutional an order requiring utilities to allow a consumer group to use the "extra space" in their billing envelopes four times a year to disseminate the group's potentially-hostile opinions. The Court observed that "forced associations that burden protected speech are impermissible." 475 U.S. at 12; *see also id.* at 21 (Burger, C.J., concurring). It sufficed, in the Court's analysis, to constitute such an impermissible forced association that the utilities were required to disseminate the third party's speech in envelopes that the companies owned and that bore their return address. *Id.* at 18. In this case, since the class action allegations are *not* those of the Colorado District Court, but rather those of the plaintiffs, the forced mailing of the class action notice containing the allegations would suffice to associate them with Mountain Bell.

Similarly, because the Colorado Supreme Court misconstrues the notice as containing only objectively neutral information, it does not appreciate that Mountain Bell may feel compelled to respond to the notice that the District Court's order will force it to diseminate. Indeed, whereas Mountain Bell might choose to say nothing of the class action lawsuit if the plaintiffs were mailing the notice, if the Company is forced to include the notice in its monthly billing envelopes, it may feel constrained also to use a newsletter or other regular notice to its customers to discuss the suit and defend its position. "The danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected . . . ." *Id.* at 16. Even if the Company does not respond, its message will

have been altered by the mere inclusion of the class action notice.

C. A Class Action Notice Is Not Commercial Speech.

The Colorado Supreme Court relies upon the principle that commercial speech is afforded less protection under the First Amendment than is non-commercial speech, Petition at 15a-16a, but it simply does not understand the true nature of commercial speech. In the Colorado Supreme Court's view, a "court-ordered notice of a class action involving a commercial transaction between the company and its customers" is commercial speech. *Id.* at 17a. That view is not in accord with this Court's prior holdings.

This Court's commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), *quoting Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *see also Board of Trustees v. Fox*, —— U.S. ——, 109 S. Ct. 3028, 3031 (1989).

The class action notice at issue in this case does not propose a commercial transaction, nor is it even speech by a commercial entity. Rather, the notice is about a lawsuit against Mountain Bell by some of its customers. To the extent that it advertises anything, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980), it advertises that lawsuit. It would be wholly inappropriate, therefore, to require Mountain Bell to mail out the class action notice on the theory that the notice is commercial speech. Moreover, "[b]ecause 'commercial speech' is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." *Id.* at 579 (Stevens, J., concurring). The Colorado Supreme Court's

definition would stretch commercial speech far beyond the bounds deemed proper by this Court.

D. A Class Action Notice Can Be Distributed Without Sacrificing First Amendment Rights.

According to the Colorado Supreme Court, this Court's decision in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), stands for the proposition that "in a case where a defendant can perform the task of sending notices to class members by simply enclosing the notices in the defendant's periodic mailings to class members, at no additional or at most insubstantial expense to the defendant, a court is certainly justified in requiring the defendant, rather than the representative plaintiff, to perform the task of mailing the class notices to class members." Petition at 14a. In fact, *Oppenheimer* does *not* stand for that proposition, because the case dealt with whether defendants should pay for compiling a list of class members rather than whether defendants should mail the notices to them, 437 U.S. at 360, and because the cases cited in a footnote to the opinion, *id.* at 355 n.22, did not order defendants to accomplish such mailings. *See* Petition at 10 n.6.

All *Oppenheimer* says is that in some instances, "the defendant may be able to perform a necessary task with less difficulty or expense than could the representative plaintiff. In such cases, we think that the court properly may exercise its discretion under Rule 23(d) to order the defendant to perform the task in question." 437 U.S. at 356. Even that proposition, however, is limited in two respects. First, courts must not stray too far from the principle that the representative plaintiff should bear all costs relating to the sending of notice, because it is the plaintiff who seeks to maintain the suit as a class action. *Id.* at 359. And second, when freedom of speech is at stake, courts also must not disregard the First Amendment rights of defendants. *See Riley v. National Fed'n of the Blind*, —— U.S. ——, 108 S. Ct. 2667, 2676 (1988); *Pacific Gas and Electric*, 475 U.S. at 19 (citing cases).

That is, "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *see Pacific Gas and Electric*, 475 U.S. at 20; *Wooley v. Maynard*, 430 U.S. 705, 716 (1977). In this case, the state's interest, as expressed in Colorado Rule 23(c)(2), in "direct[ing] to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," Petition at 41a-42a, can be satisfied without requiring Mountain Bell to mail the notices. That is because Mountain Bell is willing to turn over to the plaintiffs its customers list for just that purpose.

Armed with this list, plaintiffs would be free to mail the class action notices themselves, without requiring judicially-enforced access to Mountain Bell's monthly billing envelopes. Instead, however, plaintiffs proposed to the District Court that they could save approximately $200,000 in postage if the court ordered Mountain Bell to include the notices in its own envelopes and thus subsidize the cost of mailing them. *See id.* at 9.

Mountain Bell has approximately 1.2 million residential customers in Colorado and some 235,000 business customers. *Id.* at 2a. By persuading the District Court to order Mountain Bell to mail the class action notices, and the Colorado Supreme Court to uphold that order, the plaintiffs stand to save roughly 14 cents in mailing costs per potential class member. They have done so, however, by riding roughshod over Mountain Bell's First Amendment freedom of speech. Yet this Court has stated, in no uncertain terms, that when evaluating more or less efficient means to achieve a societal end, "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 108 S. Ct. at 2676, *citing Schaumburg v.*

Citizens for a Better Environment, 444 U.S. 620, 639 (1980); *Schneider v. State*, 308 U.S. 147, 164 (1939).

The *amici curiae* submit that the District Court's order, and the judgment of the Colorado Supreme Court upholding it, did just that.

CONCLUSION

For the foregoing reasons, as well as those stated by Mountain Bell in its petition, the writ of *certiorari* should be granted.

Respectfully submitted,

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